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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRELIMINARY STATEMENT

This petition for a writ of certiorari seeks review of the decision of the court of appeals directing the district court to furnish to the respondents copies of tape recordings of presidential conversations admitted as evidence in the trial of *United States v. Mitchell, et al.* The petitioner, Richard Nixon, was a respondent in the court of appeals. The respondents in this Court (appellants in the court of appeals) are Warner Communications, Inc.; National Broadcasting Company, Inc.; American Broadcasting Companies, Inc.; CBS, Inc.; Radio

Television News Directors Association; and Public Broadcasting Service. Other parties in the court below were parties to the criminal case out of which this proceeding arose: the United States of America, John N. Mitchell, Harry R. Haldeman, John D. Ehrlichman, Robert C. Mardian, and Kenneth W. Parkinson. The United States and Harry R. Haldeman submitted memoranda in the court of appeals, but none of these parties participated in oral argument.

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a to 27a) is not yet reported. The Memorandum Opinion and Order of the district court from which appeal was taken (App. C, *infra*, pp. 29a-35a) is reported at 397 F. Supp. 186. Two earlier memorandum opinions on the same application by a different district judge (App. D, *infra*, pp. 36a-45a) are reported at 386 F. Supp. 639.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion and judgment of the court of appeals (App. A, *infra*, p. 1a) was entered on October 26, 1976, and a timely petition for rehearing was denied by order dated December 3, 1976 (App. B, *infra*, p. 28a). This petition is timely filed within 90 days of that date.

QUESTIONS PRESENTED

1. Whether tape recordings of conversations among a President of the United States and his closest aides, produced over a claim of presidential privilege in order to meet "the fundamental demands of due process of law in the fair administration of criminal justice" and thereafter

played in open court as evidence in a criminal trial, must be supplied by the court to private parties for radio and television broadcast and for sale in the form of phonograph records and tape cassettes.

2. Whether tape recordings and other physical evidence obtained by compulsory process and used as evidence in a federal court trial must be reproduced by the court and distributed to private parties upon request unless the owner can demonstrate that "justice requires" denying the request.

3. Whether the court of appeals, on the basis of a supposed common-law right of the public to obtain copies of recordings used as evidence in a criminal trial, properly overrode the determination by the district court to delay any release of the recordings until the appeals in the criminal case and any necessary retrials of the defendants were concluded.

STATEMENT

A. The Tape Recordings at Issue.

In July and August of 1974, numerous tape recordings of confidential discussions between then-President Nixon and his aides were produced by Mr. Nixon for *in camera* inspection pursuant to a subpoena by the prosecution in the Watergate conspiracy case, *United States v. Mitchell, et al.*, Cr. No. 74-110 (D.D.C.). Each of these tape recordings had been the subject of a formal claim of presidential privilege asserted by Mr. Nixon. In litigation culminating with this Court's decision in *United States v. Nixon*, 418 U.S. 682 (1974), the recordings were deemed "presumptively privileged," but the privilege was held to be overridden under the circumstances by the "demonstrated, specific need for evidence in a pending criminal

trial" combined with "the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713. The Court directed the trial judge to inspect the recordings *in camera* and to transmit to the Special Prosecutor those portions deemed relevant and admissible in evidence.[1]

During the course of the Watergate conspiracy trial, selected portions of the subpoenaed tapes, totaling some twenty-two hours of conversations, were admitted into evidence and played for the benefit of the jury. When the tapes were played in the courtroom, members of the press and the public in attendance, as well as members of the jury, were equipped with headphones enabling them to hear the evidence as accurately and conveniently as possible, and printed transcripts of each conversation were distributed to those present as well as to the press and the general public. No limitations of any kind were placed on the press or the general public as to reporting or what occurred in the courtroom or as to the uses that might be made of the transcripts.

The conversations played during the trial are contained on some fifty separate tape reels, which were reproduced from the original tapes. (JA 21-22.)[2] Only portions of these reels were played to the jury; the portions of conversations not played remain confidential. To produce a tape recording containing only those portions of the conversations used as evidence in the trial would require five to seven days work by a sound recording technician and the participation of someone sufficiently familiar

[1]Other recordings had been produced under similar circumstances in November 1973 following the decision in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

[2]The abbreviation "JA" refers to the Joint Appendix filed in the court of appeals.

with the tapes to locate and identify the published portions. (JA 22-23.)

B. Proceedings In The District Court.

Prior to the commencement of the trial, news commentators for the commercial television networks requested Judge Sirica to make available to them, for copying, the tapes played during the course of the trial. In a letter dated October 2, 1974 (App. E, *infra*, pp. 46a-48a), Judge Sirica denied the request, citing an attached memorandum of the Chief Judge of the District Court, representing a consensus of the district court judges consulted on the matter. This memorandum noted the uniform opposition of the Court to broadcasting of court proceedings, and stated: "As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained" (p. 48a, *infra*).

On November 12, the respondent broadcast companies filed an application before Judge Sirica claiming a right under the First and Sixth Amendments to obtain copies of the tapes played in evidence during the trial then in progress. The stated purpose of the application was to permit broadcast of the recorded conversations on television and radio. On December 2, Warner Communications Inc. filed a separate application for copies of the portions of the tapes played in evidence in order to make and sell phonograph records and tape cassettes of the conversations (JA 41). Petitioner Richard Nixon filed an opposition to the applications, which were assigned to Judge Gesell for determination while the Watergate criminal trial was in progress before Judge Sirica.

On December 5, 1974, Judge Gesell entered a Memorandum and Order on the various applications.

Judge Gesell found the applicants' First Amendment claim "wholly without merit" (p. 37a, *infra*) and held that Mr. Nixon had standing to oppose the applications (p. 41a, *infra*). He rejected the petitioner's opposition, however, on the ground that Mr. Nixon's words on the tapes had become "public property" (*id.*), and indicated that the applicants were entitled to copies of the portions of the tapes in issue if "a satisfactory mechanism and procedure can be evolved" (p. 43a, *infra*).

On December 27, the respondents jointly submitted a "memorandum on implementation of the Court's order" and a 3-page proposed order (JA 73-75) setting forth technical and logistical procedures for duplicating the recorded conversations in a manner suited to the respondents' purposes. On January 8, 1975, Judge Gesell entered an order rejecting the proposal. Judge Gesell concluded (p. 44a, *infra*):

> "The burden is upon the applicants to come forward with a satisfactory plan to be administered without profit by some responsible agency or person other than the Clerk of Court. It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized. Applicants have failed even to consider these matters. Moreover they suggest no responsible agency or person to administer the plan and merely undertake to place all of these problems back on the Court, which is not equipped with necessary funds, technology or manpower."

The order denied all applications without prejudice, and, since the Watergate trial had by then been completed, transferred the matter back to Judge Sirica for "any further action that may be appropriate in the premises at some later date." (*Id.*) No appeal was taken from this order.

On March 6, 1975, Judge Sirica held a status conference at which he solicited the views of counsel on whether, in view of the pending appeals from convictions in the Watergate conspiracy trial, further action on the applications should be postponed. Following a brief argument, the Court invited the parties to submit written memoranda on this point, and such memoranda were submitted by the respondents and by petitioner Richard Nixon on March 13, 1975.

Judge Sirica entered a Memorandum Opinion and Order on April 4, 1975. (App. C, *infra*, pp. 29a-35a.) The opinion noted at the outset: "This matter comes before the Court solely for consideration of the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110" (p. 29 a, *infra*). On this preliminary issue, the Court concluded that any release and distribution of the requested tapes should await decision of the appeals by the convicted defendants in the Watergate conspiracy trial.

The reasons for Judge Sirica's determination were thoroughly explained in his opinion. First, the court noted that all four convicted defendants had filed notices of appeal, and should one or more of them prevail, a new jury would have to be empaneled and the case retried. In view of that circumstance, "the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence" (p. 30a, *infra*). Judge Sirica also took note of the admonition of the Supreme Court in *United States v. Nixon, supra,* that the District Judge should "at all times accord to presidential records that high degree of deference suggested in *United States v. Burr* . . .," and continued (p. 31a, *infra*): "It is in the light of this solemn responsibility as well as a concern for

the rights of the defendants that the applicants' request for immediate access to the tapes must be examined."

The district court then noted the likelihood of distribution of tapes and phonograph records of the conversations "perhaps with commentary by journalists or entertainers," marketed by "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales," and which "would be put to untold varieties of inappropriate and scandalous uses, just as any other commercial recording would be." The court concluded (p. 31a, *infra*):

> "Thus, it appears to the Court that the rights of the appellants in the criminal case (and many others), might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes."

The interests advanced by the applicants in favor of immediate release, the district court held, were not compelling. No restraints were presently or had been placed on disseminating transcripts or reporting what occurred during the trial, and "the argument that the public's 'right to know' presents a compelling reason for granting immediate access to the tapes must be rejected." (p. 32a, *infra.*) The court found that "no harm will be done if the possible release of the tapes and any further implementation of the December 5, 1974 Order is delayed until the appeals in the *Mitchell* case are decided." (p. 34a, *infra.*) For these reasons, the district court denied "without prejudice" the respondents' "petitions for immediate access" to the tapes for the purpose of copying. (*Id.*) The respondents appealed.

C. The Decision of the Court of Appeals.

The court of appeals did not address what it termed "the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth or Fifth Amendments to the Constitution." It held that there exists a "common-law right to inspect and copy judicial records," which "extends to exhibits" regardless of their nature. (P. 14a, *infra.*) The court stated that exceptions might be made to this "common-law right," but that such exceptions may be made only where "justice so requires." (P. 15a, *infra.*) On that basis, the court held that the question in this case, which the district court "should have addressed," was as follows (p. 17a, *infra*):

> "[W]hether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records."

The court then concluded *(id.)*: "Once the question is recast in these terms, the answer becomes inescapable . . ."

The court first addressed the finding by Judge Sirica that putting the tapes in the hands of broadcasters and record companies might "seriously and permanently damage" the rights of the criminal defendants in the event a retrial became necessary.[3] The court of appeals

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[3]The court correctly noted (p. 20a n. 47, *infra*) that it was not the petitioner, but the trial judge, who raised this concern *sua sponte*. The court failed to explain why the petitioner bore a "burden" of "demonstrating that justice required" this action by Judge Sirica, when the petitioner has no direct interest in the criminal case and the trial judge was the one person with the greatest familiarity with the evidence, the problems of selecting an unbiased jury, and the likelihood of retrials of some of the defendants.

held the trial judge's concern to be insufficiently serious to warrant withholding distribution of the tapes until the criminal appeals were concluded, because (1) retrials were at the time only a "possibility,"[4] (2) the court "seriously question[ed]" whether "listening to the tapes prior to a retrial would render every listener incapable" of rendering a fair verdict as a juror (p. 19a, *infra*), and (3) neither the government nor the criminal defendants had objected, in the district court, to the respondents' applications. On the last point, the court noted that defendant Haldeman had filed a memorandum in the court of appeals opposing distribution of the tapes on the ground that the resulting publicity would jeopardize his rights upon any retrial, but the court found that Mr. Haldeman's statement "hardly warrants careful attention." (P. 20a n. 47, *infra.*)

The court then turned to the question whether "concern for the privacy of the persons whose conversations were taped" or "deference owed to presidential records" could justify the district court's decision. (Pp. 20a-21a, *infra.*)[5] The court held that respect for the

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[4]The court, in a footnote (p. 17a n. 41, *infra*), noted that it had only recently reversed the conviction of Mr. Mardian, thus presumably making a retrial more than a "possibility," but did not believe that fact should alter its conclusion.

[5]Judge Gesell discussed these factors in his earlier opinion in this matter (App. D., *infra*), but the issues were not reached by Judge Sirica. The court of appeals "presumed" that Judge Sirica did not reach them because of Judge Gesell's earlier ruling that the factors did not justify denying the relief requested by the respondents. Yet Judge Sirica's opinion (App. C., *infra*), belies that "presumption." Judge Sirica spoke of the release, "*if ever,*" of the recordings (p. 29a, *infra*), and merely determined to postpone consideration of the "*possible*" release of the tapes "until the appeals in the *Mitchell* case are decided" (p. 34 a, *infra*; emphasis added). Judge Sirica thus had no reason to decide what he plainly

[footnote continued]

interests of the petitioner and others in being free from mass merchandising and sale of their words spoken in confidence was not a justifiable basis for declining to distribute copies of the recordings, stating that "neither courts nor legislatures have felt this interest worthy of protection," and observing that the tapes do not contain "bedroom or other intimate conversations," but rather discussions "between business associates." (P. 22a, *infra.*) As to the admonition of this Court, referred to by Judge Sirica, that the district court must "accord to presidential records that high degree of deference suggested in *United States v. Burr* . . .", the court of appeals held that such deference was required only in safeguarding their confidentiality, not in their treatment after being once disclosed. The contention that mass distribution and marketing of the tapes would offend the respect owed by the court to the office of the President was, the court believed, merely "a question of taste" offering "a singularly weak basis" for the court to reject the applications. (P. 25a, *infra.*) Furthermore, the court added, these considerations have less weight because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry way into the public domain." (P. 23a, *infra.*)[6]

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regarded as serious issues in this regard. In view of the fact that Judge Gesell ruled that "if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence" (p. 42 a, *infra*), and in view of the indications from the court of appeals (p. 21a n. 52, *infra*) and the respondents that no such basis will be possible, it can hardly be said that Judge Gesell's decision represented the "law of the case."

[6]The constitutionality of this Act, and thus the validity of the court of appeals' reasoning in this regard, is presently before this Court in *Nixon v. Administrator of General Services*, No. 75-1605 (prob. juris. noted November 29, 1976).

The court thus reversed Judge Sirica's order and remanded for development of a "plan for release" of the recordings embodying the principles outlined earlier by Judge Gesell. On motion of the petitioner, the court stayed its mandate pending a petition for certiorari, but remanded the record to commence proceedings looking to the development of a plan for distribution.[7]

Judge MacKinnon, dissenting, noted that "[a]ccess to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony" (p. 26a, *infra*), for "exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished." (*Id.*) He noted that the process of reproduction and distribution of the tapes could "compromise the integrity of a vital trial exhibit (p. 27a n. 4, *infra*), thus possibly constituting "good cause in a subsequent trial for a court to reject them as unreliable evidence." (P. 26a, *infra.*) Judge MacKinnon would have affirmed the district court's determination to withhold any action until all appellate remedies and necessary retrials were concluded, for "[a] significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains." (P. 27a, *infra.*)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals establishes three propositions of novel and continuing significance to the scope of the historic decision of this Court in *United*

[7]On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative "procedure for developing the plan" for copying and distribution of the tapes.

States v. Nixon, 418 U.S. 683 (1974), as well as to the administration of justice in the federal courts. They are:

- That the necessary consequence of any judicial determination to override an assertion of presidential privilege in order to fulfill "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions," 418 U.S. at 707, is to place the subpoenaed materials in the hands of private parties to be broadcast on television, to be marketed in the form of phonograph records and cassettes, to be played at cocktail parties and in satiric productions, and to be exploited in any other fashion that may occur to enterprising and imaginative recipients.
- That physical evidence obtained by compulsory process from third parties for use as evidence in a federal court must, if technically feasible, be reproduced by the court and provided to private parties upon request absent a demonstration by the owner that "justice requires" denying the request.
- That a district judge may not decline to provide copies of physical evidence in a criminal trial to the news media and the public at the conclusion of the trial, despite its finding that such distribution might seriously prejudice the rights of the defendants to a fair trial should the conviction be reversed on appeal.

These propositions are separately discussed below. Preliminarily, it should be clear that, despite misleading statements in the opinion of the court of appeals, this case does *not* involve any attempt by the district court to impose secrecy of any kind upon its records or proceedings, or to limit the press or the public in any way as to what may be printed or broadcast. The court of appeals repeatedly spoke of "the common law right to inspect public records" (p. 9a, *infra*), the "right of access

to judicial records" (p. 10a, *infra*), and implied that Judge Sirica's decision was "an attempt to maintain secrecy" (p. 9a, *infra*), "denying public access to real and documentary evidence" (p. 13a, *infra*), and an exercise of "the power to seal [court] records . . ." (p. 14a, *infra*).

The suggestion that these conversations have been maintained in "secrecy" or "under seal" is absurd. They were played in open court, where the press and the public in attendance were provided earphones for convenient listening; transcripts were provided to all who requested them, and continue to be available at bookstores around the country. Furthermore, the district court has not denied *access* to the tape recordings by the respondents, at this or any other time; indeed, no request has been made, so far as the record shows, simply to inspect the recordings. The application in the district court was to *obtain copies* of the recordings in order to enable the respondents to broadcast and sell them.

The distinction between access and public distribution has been clearly recognized in other contexts. For example, tape recordings of oral arguments in this Court deposited with the National Archives may be played to members of the public "for serious scholarly and legal research," but copies may not be provided except after the expiration of three years from the date of oral argument and then only with permission of the Marshal; and "copies of the tapes will not be reproduced for commercial purposes." (GSA Accession Inventory, April 9, 1974, reprinted as Appendix F, *infra.*) Furthermore, the matter of providing copies of presidential conversations under the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, has been a source of continuing disagreement between the General Services Administration and the Senate. (See p. 23a, n. 57, *infra.*)

This is not, therefore, a case which falls within the tradition of the cases cited and relied upon by the court of appeals. The action of the court of appeals represents a departure from tradition, and a precedent which puts in serious doubt the power of a district court to control the uses to which its own process is put and to protect the rights of parties and witnesses in the criminal justice system.

1. In *United States v. Nixon,* 418 U.S. 683 (1974), this Court recognized a presumptive privilege for confidential presidential communications, which rests on "the values to which we accord deference for the privacy of all citizens," as well as "protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decisionmaking." *Id.* at 708. The Court ruled, however, that "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions" required that the recordings be produced, because of the "demonstrated, specific need for [this] evidence in a pending criminal trial." *Id.* at 707, 713. In requiring production of the tapes, the Court specifically directed the district judge to "at all times accord to presidential records that high degree of deference suggested in *United States v. Burr.* . . ." *Id.* at 715.

The "specific need for evidence in a pending criminal trial," which was the sole reason and purpose for the compelled production of these tape recordings, has now been satisfied. The question raised by the present case is whether a necessary product of this Court's ruling in *United States v. Nixon, supra*—and a necessary concomitant of any future ruling enforcing a subpoena for presidential tape recordings—is to put copies of the recordings in the hands of broadcast companies, phonograph record manufacturers, comedy teams, foreign

governments and organizations, or anyone else who desires them. Even if a district court has discretion to reproduce and distribute recordings in its possession pursuant to subpoena, a proposition with which we disagree, a decent respect for the delicate relationship between the Judicial and Executive Branches in matters concerning compelled disclosure of presidential communications—emphasized by this Court in *United States v. Nixon, supra*—would appear to dictate that the recordings not be publicly disseminated in this case. We submit that the decision of the court of appeals that such considerations are no more than "a question of taste" inappropriate for judicial cognizance, warrants review by this Court.[8]

2. Tape recordings and other physical exhibits (films, videotapes) are used as evidence in federal courts with increasing frequency, and are often obtained under legal compulsion without the consent of the person whose voice or image appears in the exhibit. Tapes of wiretapped conversations are but one common example. The clerk of a district court, with respect to this property, has been held to function "as a mere custodian," having possession as "an incident of the trial before the District." *United States v. Monjar*, 154 F.2d 954, 957 (3d Cir. 1946). Subpoenaed records remain the

[8]The court of appeals apparently felt the consequences of public distribution of the recordings by the court were to be given less weight in this case because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry way into the public domain." (P. 23a, *infra*.) The constitutionality of that Act on its face, however, is now pending before this Court in No. 75-1605, *Nixon v. Administrator of General Services* (prob. juris. noted Nov. 29, 1976), and even under the Act, it is far from certain at this time that copies of presidential tape recordings will be disseminated to the public.

property of the owner, and must be returned once the judicial proceeding which required their production is concluded. See *Robert Hawthorne Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098, 1129-1133 (E.D. Pa. 1975); *Application of Bendix Aviation Corp.*, 58 F. Supp. 953, 954 (S.D.N.Y. 1945); Rules of the United States District Court for the District of Columbia, Rule 2-10(b).[9] Never before has any court, so far as our research discloses, held such property, while in the possession of the court, subject to duplication and public dissemination by the clerk without the consent of the party from which it is obtained.[10]

The court below referred to tapes of wiretapped conversations and pornographic film exhibits as "special cases" which might justify a different rule (pp. 13-14a, *infra*), though how such cases are to be distinguished from the present case is not apparent. Indeed, given the burden that the court of appeals held to be required of anyone who would "interfere" with public distribution of trial exhibits—*i.e.*, to demonstrate that "justice requires" withholding distribution—a court reporter's tape recording of a criminal trial, surely a "judicial

[9]The court of appeals conceded that exhibits "generally are returned to their owners," but stated this to be "primarily because it is impractical to retain the exhibits in the courthouse." (P. 13a, *infra*.) Insofar as the court implied that a person may, if "practical," be permanently deprived of his property—in essence, suffer condemnation—merely by the issuance of a trial subpoena, its holding is even more radical than may at first appear.

[10]The facts that Rule 10(a), Federal Rules of Appellate Procedure, provides that exhibits shall be included in the record on appeal, and that the "Manual for the Clerks of the United States District Courts" provides for "retention" for "documentary exhibits" in historic cases (see p. 12a, *infra*), are irrelevant; neither the Rule nor the Manual provide for reproduction and public distribution of any exhibits whatsoever.

record," would seem to be henceforth subject to copying and broadcast upon demand of the networks or other private parties. Thus, the decision of the court of appeals casts in serious doubt the legality of local court rules which prohibit use of any such recording, or any recording or videotape of a deposition used as evidence in a trial, on radio or television broadcasts. See Rules of the United States District Court for the Central District of California, Rules 29(b), 29(h).

We submit that where, as here, all the requirements of a "public trial" under the Sixth Amendment are abundantly satisfied, and where there can be no claim of secrecy as to the records or proceedings of the court, there is no justification in law or tradition for subjecting one whose recorded words are subpoenaed for the sole purpose of use as evidence in a criminal trial, to the additional indignity of having those words disseminated by the court for broadcast and sale.[11] At least, if the

[11]Contrary to the assertion by the Court of Appeals (p. 22a, *infra*), the petitioner did *not* "concede" that intrusion on the sensibilities of persons whose recorded conversations are appropriated for broadcast and sale "is not the type of injury against which the law provides protection." The petitioner *did* concede that, if the court released the tapes to the respondents for broadcast, it is doubtful whether petitioner would have a cause of action under the privacy laws against the broadcasters. This is because once a court places a physical exhibit in the public domain (*i.e.*, beyond the exhibit's necessary use in the course of a judicial proceeding), a privacy action based on its reproduction and distribution would presumbaly be subject to the rule of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), limiting privacy actions in such circumstances. The *injury* resulting from release—"offense to [an individual's] sensibilities caused by some unwanted and unwarranted publication of his likeness or activity," *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 496 (3d Cir.) (Hastie, J., dissenting), *cert. denied*, 351 U.S. 926 (1956)—is very much one which courts have felt worthy of protection, and which the district court was entitled, if not compelled, to take into account in determining whether to release the tapes at all.

court of appeals' holding is to be the rule followed henceforth by federal courts, it is this Court that should so decide.

3. This Court has fixed in explicit terms the duty of a trial judge to take "strong measures" to guard against the influence of unwarranted publicity upon the criminal trial process. The Court stated, in *Sheppard v. Maxwell*, 384 U.S. 333, 362-363 (1966):

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

By contrast, the decision of the court of appeals in the present case totally ignores the primary role of the trial judge in deciding what steps are necessary or appropriate, in the context of a particular case, to protect its process against prejudicial publicity. Furthermore, the court below explicitly barred a judge from examining whether there is any "compelling reason" to take action which will necessarily create publicity unfavorable to an accused; it rather has imposed a duty on a party opposing such action to demonstrate that "justice requires" denying the relief requested by the media.

Obviously, where protective measures come into conflict with First or Sixth Amendment rights of an accused or of the public, an appellate court must ensure that the balance is properly struck. In this case, however, no constitutional right of the respondents or the public is

at stake; even the court of appeals characterized the right of the respondents as a "common law right to inspect and copy judicial records," which the court extended to include trial exhibits. (P. 14a, *infra.*) In substance, the court of appeals, by divided vote, has merely substituted its judgment as to whether the integrity of the trial process requires withholding distribution of the tapes for the judgment of the trial judge, the one person most qualified to make such a determination. If a trial court is not permitted the discretion to make its own considered determination as to whether a particular action is consistent with its duty to protect the integrity of its processes from prejudicial publicity, then we suggest that this Court's principle stated in *Sheppard v. Maxwell, supra,* must henceforth be treated as a hollow admonition.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

IN RE: NATIONAL BROADCASTING COMPANY, INC., ET AL., APPELLANTS

No. 75-1410

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

WARNER COMMUNICATIONS, INC., APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Miscellaneous 74-128)

Argued February 20, 1976

Decided October 26, 1976

[illegible] entered this date

Floyd Abrams for appellants in No. 75-1409.

Joseph A. Califano, Jr., with whom *Richard M. Cooper* and *Sidney Rosdeitcher*, were on the brief for appellant in No. 75-1410.

William H. Jeffress, Jr., with whom *Herbert J. Miller, Jr.*, was on the brief for appellee, Richard Nixon. *R. Stan Morenson*, also entered an appearance for appellee Richard Nixon.

Henry S. Ruth, Jr., Special Prosecutor, entered an appearance for appellee United States.

Frank H. Strickler, entered an appearance for appellee Haldeman.

Before: BAZELON, *Chief Judge*, MACKINNON, *Circuit Judge* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

Opinion for the Court filed by *Chief Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

BAZELON, C.J.: In this action the three commercial television networks joined by the Public Broadcasting System, the Radio Television News Directors Association, and a large manufacturer of phonograph records, seek to inspect and copy those portions of former President Nixon's "White House tapes" that were played before the jury at the criminal trial of several of Nixon's top aides. It is conceded that one who listens to the tapes—the inflections, pauses, emphasis and the like—will be better able to understand the conversations than one who only reads the written transcripts that already have been published. The district court nonetheless held that at least until the former aides' pending appeals from

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

their convictions are decided, the tapes cannot be distributed. We reverse.

I

On June 17, 1972, five men employed directly or indirectly by the Committee to Reelect the President were arrested inside the Democratic National Committee's offices in the Watergate office building. They were there to photograph documents and to repair a hidden listening device installed during a previous burglary. On September 15, 1972, these men and two others were indicted for conspiracy, burglary, and an unlawful endeavor to intercept wire communications. They were all convicted.[1]

On March 1, 1974, seven additional individuals, including former Attorney General Mitchell and three former top White House aides were indicted for, *inter alia*, conspiring to obstruct justice by concealing the identities of the persons responsible for the Watergate break-in. Trial began in that case on October 1, 1974 and concluded three months later with four convictions and one acquittal.[2]

[1] Bernard Barker, Eugenio Martinez, Frank Sturgis, Virgilio Gonzalez and Howard Hunt entered pleas of guilty in United States v. Liddy, D.D.C. Crim. No. 1827-72; the attempt of the first four defendants to withdraw their guilty pleas was unsuccessful, United States v. Barker, 514 F.2d 208 (D.C.Cir.), *cert. denied*, 421 U.S. 1013 (1975). James McCord and Gordon Liddy were found guilty after trial and their convictions were affirmed by this court. United States v. Liddy, 509 F.2d 428 (1974), *cert. denied*, 420 U.S. 911, (1975); United States v. McCord, 509 F.2d 334 (1974), *cert. denied*, 421 U.S. 930 (1975).

[2] The four convicted defendants appealed to this court. Three of those convictions were affirmed, United States v. Haldeman et al., No. 75-1381 (D.C.Cir. Oct. 12, 1976), and one was reversed, United States v. Mardian, No. 75-1383 (D.C.Cir. Oct. 12, 1976). One defendant pleaded guilty prior to trial; another's case was severed and ultimately dismissed.

Prior to trial, the Watergate Special Prosecutor subpoenaed certain tape recordings of conversations between then-President Nixon and his former aides. The President contested the validity of the subpoena, but the Supreme Court eventually upheld it.[3] The tapes were then turned over to the district court which, after listening to them *in camera*, arranged to have a copy made of the admissible and relevant portions. These "edited tapes" were given to the Special Prosecutor. At the trial of Messrs. Mitchell et. al.—hereinafter referred to as "the Watergate trial"—most but not all of the edited tapes—between 16 and 22 hours worth—were played and the reels of tape were introduced into evidence as exhibits. During the playing of the tapes, those in attendance were furnished with earphones and with transcripts prepared by the Special Prosecutor's office. These transcripts were not introduced into evidence; however, the press and public were permitted to retain their copies, and the transcripts were widely reprinted.

On November 12, 1974, six weeks after the Watergate trial had begun, the broadcast-appellants filed a motion before Judge Sirica, the trial judge in the Watergate case, seeking permission to reproduce and broadcast the portions of the tapes introduced into evidence.[4] Copies

[3] United States v. Nixon, 418 U.S. 683 (1974).

[4] The Public Broadcasting System actually did not join the request until the following day. Warner Brothers, the phonograph record manufacturer who is a party to this case, filed its request several weeks later.

Two months before the networks filed their motion, a CBS correspondent had written a letter to Judge Sirica on behalf of two other television correspondents and himself, requesting, *inter alia*, that the tapes be made available to the news media during the trial. Judge Sirica asked then-Chief Judge Hart for his advice; after consulting with many of his colleagues Judge Hart informed Judge Sirica that it was their unanimous conclusion that release of transcripts "would appear to constitute more than adequate disclosure." Judge Sirica informed CBS by letter that he agreed with that conclusion.

of the motion were served on all parties to the trial and on former President Nixon. Judge Sirica decided that the movants lacked standing to make a motion in the criminal case, and therefore directed that the motion be turned into a miscellaneous civil action. He gave all persons desiring to respond one week to do so. Since Judge Sirica did not have time to study the request during the Watergate trial, the action was referred to another district judge, Judge Gesell.[5] Judge Gesell directed the Clerk of the Court to prepare a report on the feasibility of reproducing the tapes.

On November 26, 1974, the Clerk filed an affidavit indicating that reproduction seemed practicable. He reported that two copies of the "edited tapes" already had been made, so that while one was being played in the courtroom the other could be used to produce additional copies. He further reported that the machinery for making copies was available to the Office of Special Prosecutor; that their professional engineer was willing to assist in the reproduction for his standard fee; and that a deputy clerk could be made available to assure that only those portions of the tapes that were actually played into evidence would be reproduced. He estimated that to make one complete copy would take five to seven days and roughly 50 reels of tape, at a cost of $4 or $5 per reel.

On the same day that the Clerk's affidavit was filed, the Government and Mr. Nixon filed memoranda respond-

[5] Before ruling on the standing issue, Judge Sirica had referred the networks' application to Chief Judge Hart, who in turn asked Judge Gesell to study the matter and report at an Executive Session of the Court. After Judge Sirica decided to convert the application into a civil case, Judge Hart specially assigned the case to Judge Gesell.

ing to the broadcasters' motion. The Government stated that it did "not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted," and therefore did not oppose the motion. Mr. Nixon did offer opposition, contending that to grant the motion would:

> have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others whose voices appear on the tapes . . . and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein . . .

On December 5, 1974, Judge Gesell entered an opinion upholding appellants' right to inspect and copy the tapes.[6] He found that the court's routine practice was to provide copies of exhibits when requested, and that this practice "reaches far back into our common law and tradition."[7] He concluded that Mr. Nixon's interest in avoiding embarrassment did not justifying deviating from the practice.[8] Because of anticipated "administrative and mechanical difficulties," however, Judge Gesell decided that no attempt should be made to copy the tapes before the Watergate trial, which was then in its final stages, had ended.[9] At the same time, he requested the parties to submit concrete proposals that would enable the tapes to be released after trial on a non-profit basis, "without

[6] United States v. Mitchell, 386 F.Supp. 639 (1975).

[7] *Id.* at 641.

[8] *Id.* at 642.

[9] *Id.* at 643.

special favoritism or priority" to all persons desiring copies.[10]

In response to Judge Gesell's request, the appellants jointly filed a two-part proposal. The first part concerned preparation of a master tape: appellants proposed that the engineer who had made the copies of the "edited tapes" be retained to make a master copy, and they made suggestions as to the equipment to be used, the size of the reels, the playing speed, and various other details. The appellants agreed to assume all costs incurred in preparing the master. The second part of appellants' proposal concerned distribution: they offered to suggest the names of firms that could duplicate copies at a rapid rate (15 per day) and reasonable price ($2.20-$4.00 per reel), and suggested a two-stage distribution: first, a simultaneous delivery to all persons who made requests within 5-10 days of an initial public notice; and second, either a first come first serve delivery or a delivery at fixed intervals to all those making subsequent requests. Appellants proposed that a deputy clerk be appointed to administer the entire plan.

On January 8, 1975, Judge Gesell rejected this plan.[11] He criticized it for failing (a) to provide for distribution without profit; (b) to attempt to minimize "commercialization" and "undignified use[s]"; and (c) to identify a person or agency to administer the plan. He stated that the Court was ill-equipped to assume the administrative responsibility, and that the burden was on

[10] *Id.* After issuing his opinion, Judge Gesell denied a motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970), reasoning that, "[t]he final order must be settled before some of the underlying questions of law . . . can be properly resolved. Certification of an abstract legal issue at this stage would delay the ultimate determination of the issues."

[11] *Id.* (Order of January 8, 1975).

the appellants to develop an adequate proposal. Because the Watergate trial had ended, Judge Gesell transferred the case back to Judge Sirica.

On March 6, 1975, Judge Sirica held a status hearing at which he requested the parties to submit briefs on whether the Watergate trial had "ended" for purposes of Judge Gesell's earlier decision denying release of the tapes until the trial was over. On April 4, 1975, Judge Sirica issued an opinion on "the narrow issue of the timing of the release." [12] He found that distribution of the tapes, and the mass marketing that would result, could prejudice the rights of the Watergate defendants should their convictions be reversed and a new trial be required.[13] Reasoning that this possible prejudice outweighed any interest in immediately releasing the tapes, the court denied "without prejudice" the appellants' applications.[14] Appellants brought this appeal.

II

A

The common law has long recognized a right to inspect and copy public records. In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it.[15] But the American courts tended to view any limitation as "repugant to the spirit of our democratic citizens," [16] and therefore granted all tax-

[12] United States v. Mitchell, 397 F.Supp. 186, 187 (D.D.C. 1975).

[13] *Id.* at 188.

[14] *Id.* at 188-189.

[15] H. CROSS, THE PEOPLE'S RIGHT TO KNOW 25 (1953); 66 Am.Jur.2d *Records and Recording Laws* § 15 (1973).

[16] Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 750 (1928).

payers and citizens access to public records.[17] It was the courts' view that "no sound reason could be advanced for depriving a citizen of his right; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduct to the betterment of the public service." [18]

That the common law right to inspect public records extends to judicial records is clear. As Judge Gesell observed, the right to inspect and copy judicial records in this jurisdiction has been settled at least since 1894, when, in *Ex Parte Drawbaugh*, 2 App.D.C. 404 (1894), this court rejected an appellant's attempt to seal the records in his appeal.[19] What we said then remains equally true today: "Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access. . . " *Id.* at 407. Indeed, the importance of "public exposure to trial court proceedings," and the existence of a right to inspect judicial records was recently reaffirmed by the District of Columbia Court of Appeals.[20]

[17] *See, e.g.*, State *ex rel* Colescott v. King, 154 Ind. 621, 57 N.E. 535 (1900); Nowack v. Fuller, *supra* note 16; Fagan v. State Board of Assessors, 80 N.J.L. 516, 77 A. 1023 (1910); State *ex rel.* Wellford v. Williams, 110 Tenn. 549, 75 S.W. 948 (1903); Clement v. Graham, 78 Vt. 290, 63 A. 146 (1906); Payne v. Staunton, 55 W.Va. 202, 46 S.E. 927 (1904). See also H. CROSS, *supra* note 15, at 56; Project, *Government Information and the Rights of Citizens*, 75 MICH. L. REV. 971, 1179 (1975); Note, *The Public Right of Access to Government Information Under the First Amendment*, 51 CHI. KENT. L.REV. 164, 169 (1974).

[18] State *ex rel.* Colescott v. King, *supra* note 17, at 538.

[19] *Cf. also* District of Columbia v. Bakersmith, 18 App.D.C. 574 (1901).

[20] United States v. Burka, 289 A.2d 376 (D.C.Ct.App. 1972).

And in other jurisdictions the right of access to judicial records is equally well-settled.[21]

This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." [22] Like the First Amendment, then, the right of inspection serves to produce "an

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[21] *See, e.g.*, Ex Parte Uppercu, 239 U.S. 435 (1915) (available to litigant); *In re* Mosher, 45 C.C.P.A. 701, 248 F.2d 956 (1957); Garfield v. Palmieri, 193 F.Supp. 137, 143 (S.D. N.Y. 1961) (dictum), *aff'd*, 297 F.2d 526 (2d Cir.), *cert. denied*, 369 U.S. 871 (1962); Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (C.C. Colo. 1902); Jackson v. Mobley, 157 Ala. 408, 47 So. 590 (1908); Daly v. Dimock, 55 Conn. 579, 12 A. 405 (1887); State *ex rel.* Hurd v. Davis, 226 Ind. 526, 82 N.E.2d 82 (1948); New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957); State *ex rel.* Williston Herald Inc. v. O'Connell, 151 N.W.2d 758 (N.D. 1967); Charlottesville Newspaper Inc. v. Berry, 215 Va. 116, 206 S.E.2d 267 (1974). *See also* H. CROSS, *supra* note 15, at 135-52; 20 Am. Jur.2d *Courts* § 61 (1965); 76 C.J.S. *Records* § 36 (1952); Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260 (1948).

That the tapes are not writings does not take them outside the common law right to inspect. *See, e.g.*, Merge v. City of Manchester, 113 N.H. 533, 311 A.2d 116 (1973) (right to copy magnetic computer tape); Oritz v. Jaramillo, 82 N.M. 445, 483 P.2d 500 (1971) (same); *cf.* 28 U.S.C. § 753(b) (1970) (right to inspect court stenographer's notes or mechanical recordings as well as the transcript).

[22] Letter from James Madison to W. T. Barry, August 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910).

informed and enlightened public opinion." [23] Like the public trial guarantee of the Sixth Amendment, the right serves to "safeguard against any attempt to employ our courts as instruments of persecution," to promote the search for truth, and to assure "confidence in . . . judicial remedies." [24] And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes.

We find no need, and therefore have no occasion,[25] to decide the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth, or Fifth Amendments to the Constitution. We refer to these constitutional provisions simply to underscore the importance of the values that the common law right seeks to protect, and to make clear our duty to tread carefully in this important area.

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[23] Grosjean v. American Press Co., 297 U.S. 233, 247 (1936). Indeed, the Supreme Court has indicated that acquiring information qualifies for some First Amendment protection, *see* Branszburg v. Hayes, 408 U.S. 665, 681 (1972), as does receiving information, *see, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 U.S.L.W. 4686, 4688 (U.S., May 24, 1976). Disseminating information about court proceedings is, of course, constitutionally protected as well. *See, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Bridges v. California, 314 U.S. 252 (1941).

[24] In re Oliver, 333 U.S. 257, 270 & n.24 (1948). *See also* 6 J. WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

[25] *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

B

Appellee does not deny that a common law right to inspect and copy public records exists. Nor does he question its applicability to judicial records. He argues, however, that exhibits are *not* judicial records but are private property temporarily in the custody of the Clerk until the case in which the exhibits are introduced is concluded. He therefore contends that the common law right does not extend to inspections of exhibits.

The short answer to appellee's argument is contained in Rule 10(a) of the Federal Rules of Appellate Procedure, which provides that: "The original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal" (emphasis added).[26] This rule is buttressed by the *Manual for the Clerks of the United States District Courts*, prepared by the Judicial Conference of the United States pursuant to statutory authority,[27] which classifies exhibits as "auxiliary case records," and, as Judge Gesell noted, requires that documentary exhibits be retained in the case file in cases of historical significance, a category into which the Watergate case readily falls.[28]

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[26] *See also* F.R.A.P. 11(a) (the record "including the transcript *and exhibits* necessary for the determination of the appeal shall be transmitted to the court of appeals"); *id.* 11(b) ("documents of unusual bulk and *physical exhibits* other than documents shall not be transmitted . . .").

[27] 28 U.S.C. § 457 (1970).

[28] ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, MANUAL FOR CLERKS OF UNITED STATES DISTRICT COURTS § 201.1, 201.2(F)(1) (1966), ch. 13, Ex. 2, at 4-5, 16 (1954). *See also* Allen v. Lackey, 199 Okla. 513, 188 P.2d 215, 217 (1947) (exhibits "are a part of the court's records and as such are in the custody of and subject to the control of the court"). *But see* King v. King, 25 Wyo. 275, 168 P. 730 (1917).

Appellee's reliance on United States v. Monjar, 154 F.2d 954 (3d Cir. 1946), is misplaced. Although the court there

The Rules and the *Manual* could, perhaps, be overlooked if either logic or experience so required. Neither do. Denying public access to real and documentary evidence would be inconsistent both with the common law's attempt to provide the public with complete information and with what Judge Gesell found to be the district court's practice of providing copies of documentary and photographic exhibits on request.[29] To be sure, once a case is concluded, exhibits generally are returned to their owners,[30] primarily because it is impractical to retain the exhibits in the courthouse.[31] But appellee has not offered a single reason for denying public access to exhibits while they are in the Clerk's custody. Nor has appellee justified classifying documentary exhibits in historically significant cases as judicial records but denying that classification to non-documentary exhibits in such cases or to all exhibits in cases not of historical impact.

Appellee does point to examples of exhibits, such as pornographic movies and tapes of wiretapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a

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did say that the possession by the Clerk of exhibits was "at least in one sense, that of mere custodian," *id.* at 957, the court immediately indicated that it "did not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court," *id.* at 958. Indeed, the ultimate result in *Monjar* was that the Clerk was to retain the exhibits for a reasonable time so that Pennsylvania could litigate in Delaware courts the question of whether a Pennsylvania subpoena could reach documentary evidence located in Delaware.

[29] 386 F.Supp. at 641.

[30] Rules of the United States District Court for the District of Columbia, Rule 2-10(b).

[31] *Clerks Manual, supra* note 28, at § 207.1.

power to deny public access in special cases,[32] they do not justify a total ban on inspection. We therefore hold that the common law right to inspect and copy judicial records extends to exhibits.[33]

III

The right of access to judicial records has never been considered absolute. To the contrary, courts always have asserted the power to seal their records when deemed necessary.[34] Because no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within the sound discretion of the courts, subject to appellate review for abuse.[35]

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[32] *See* text at note 34 *infra*.

[33] The result we reach is in accord with the only case we have found in which inspection of exhibits was sought. Sloan Filter Co. v. El Paso Reduction Co., 117 F. 504 (C.C.Colo. 1902).

[34] *See, e.g.*, C. v. C., 320 A.2d 717 (Del. 1974); Sanford v. Boston Herald Traveler Corp., 318 Mass. 156, 61 N.E.2d 5 (1945); *In re* Caswell, 18 R.I. 835, 29 A. 259 (1893); H. CROSS, *supra* note 15, at 149-51; 76 C.J.S. *Records* § 36, at 140 (1952).

[35] *See* cases cited note 34 *supra*. Appellee argues that given the procedural posture of the case, our review of the district court's discretionary decision should be even more limited than usual. The major premise for this argument is that the district court did nothing more than stay action on appellant's request for the tapes pending the decision in United States v. Haldeman et al., *supra* note 2. Since stays are reviewable only by mandamus, Dellinger v. Mitchell, 442 F.2d 782 (D.C.Cir. 1971), appellee urges upon us the limited review appropriate in mandamus cases: determining whether "the trial judge misconceived the nature of his discretion or otherwise considered an irrelevant factor or refused to consider a relevant factor," Colonial Times, Inc. v. Gasch, 509 F.2d 517, 524

To say that discretion exists, however, is not to say, as appellee contends, that what is involved here "is simply a policy determination." [36] Appellants seek to vindicate a precious common law right, one that predates the Constitution itself.[37] While the courts have sanctioned incursions on this right, they have done so only when they have concluded that "justice so requires." [38] To demand any less would demean the common law right.

(D.C.Cir. 1975). For three reasons, however, we reject appellee's premise.

First, in form the district court did not stay action; it "Ordered that the applicants' petition . . . [is] denied without prejudice." 397 F.Supp. at 189. Second, the substance of the district court's decision was *not* that adjudication of appellants' claim should be deferred, but that relief should be deferred. The district court's label, a "dismissal without prejudice," thus was appropriate, as was appellants' appeal under 28 U.S.C. § 1291. *See, e.g.*, United States v. Wallace & Tiernan Co., 336 U.S. 793, 795 n.1 (1949); 9 J. MOORE, FEDERAL PRACTICE ¶ 110.13[1] (1975). Finally, after the appeals in the Watergate case are adjudicated, appellants will no longer be able to press their contention that the district court's concern over prejudicing a possible retrial, *see infra*, does not justify withholding the tapes. Thus, under the "practical" approach to "final orders" delineated in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), the district court's decision is appealable as of right.

The appealability issue is not dispositive in any event, since as explained *infra*, it is our view that the district court did misconceive the nature of its discretion.

[36] Brief at 43.

[37] That at least some appellants assert this precious right in order that they might personally profit in no way diminishes their status as rightholders. Cf., *e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[38] *See* sources cited note 34 *supra*; *cf.*, *e.g.*, MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413 (1961) (placing burden on opponent of disclosure with respect to non-judicial records);

A serious question exists as to whether sealing transcripts of proceedings held in open court or exhibits displayed in open court is ever justifiable. We have found no cases in which an attempt has been made to do so. Rather, the general rule is that "[a] trial is a public event," and "[w]hat transpires in the courtroom is public property." [39] It is not necessary for us to decide, however, whether the right to inspect evidence introduced in open court is absolute. It suffices to note that once an exhibit

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State *ex rel.* Youmans v. Owens, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *modified on other grounds*, 28 Wis.2d 685a, 139 N.W.2d 241 (1966); Note, *supra* note 17, at 172.

[39] Craig v. Harney, 331 U.S. 367, 374 (1947). The interests served by the common law right of access to judicial proceedings are closely related to First Amendment interests. *Cf.* Nebraska Press Assn. v. Stuart, 44 U.S.L.W. 5149 (U.S., June 30, 1976). In the *Nebraska Press* case, the Court held that the First Amendment prohibited a judicial "gag order," which barred publication of information which might prejudice the defendant's right to a fair trial. The Court reserved judgment as to whether proceedings could be closed to prevent prejudicial publicity. *Id.* at 5157. Once an open hearing has been held, however, there is an especially heavy presumption against restraints on reporting, which was not overcome. *Id.* at 5155, 5158.

See also In re Washington Post Company, No. 76-1695 (4th Cir., July 21, 1976), and Miami Herald Pub. Co. v. Collazo, No. 75-649 (Fla. Dist. Ct.App., March 9, 1976). In *Washington Post*, the trial judge in a much-publicized criminal case involving a high government official had ordered that all filings in the case be sealed from inspection by the press or public; the Fourth Circuit concluded that the order constituted "an unnecessary prior restraint on freedom of the press . . .," and ordered it vacated. In *Miami Herald*, the trial judge ordered the terms of a settlement in a tort suit against the city of Miami sealed from inspection. The appellate court reversed this order, noting that the "right of the press and public to know should weigh heavily against a possible tendency to influence pending cases, particularly in borderline situations . . . ." *Id.* at 9.

is publicly displayed, the interests in subsequently denying access to it necessarily will be diminished. And here we conclude that the district court abused its discretion in allowing those diminished interests in confidentiality to interfere with the public's right to inspect and copy the tapes.

A

The court justified its decision primarily in terms of the potential for prejudice to the rights of the Watergate defendants should their convictions be reversed and a new trial be sought by the Government. It stated that it was unwilling to "take any action which carries the risk of causing possible prejudice" absent a compelling reason to do so, and it found no such reason to be present.[40]

In requiring appellants to demonstrate a "compelling reason" for exercising their rights, however, the court misconceived the nature of its discretion. The question the court should have addressed was whether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records.

Once the question is recast in these terms, the answer becomes inescapable: the "*risk* of causing *possible* prejudice" at a *hypothetical* second trial does not justify infringing appellant's right to inspect and copy the tapes. This is true here for at least three reasons.

First, the very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling.[41] If the chance of a retrial

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[40] 397 F.Supp. at 188-89.

[41] This court has recently completed its consideration of the appeals of the Watergate defendants, reversing the conviction of defendant Mardian, United States v. Mardian, No. 75-1383 (D.C.Cir., Oct. 12, 1976), and affirming the convictions of all other defendants, United States v. Haldeman, No.

justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted. Moreover, even if the appeals were to end unsuccessfully there would still be a lingering possibility that a successful collateral attack would lead to a new trial. Thus, the logical conclusion of the district court's opinion may well be that which Mr. Nixon draws: "there may *never* come a time when . . . 'by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed.' " [42]

Second, assuming *arguendo* that the risk of prejudicing a hypothetical second trial can ever justify restricting access to judicial records, the risk here is not sufficiently grave. Appellants are not seeking access to an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury.[43] Rather, appellants

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75-1381 (D.C.Cir., Oct. 12, 1976). With respect to those defendants whose convictions were affirmed, the possibility of a second trial—and hence of any prejudice from release of the tapes—has obviously been significantly reduced. Although defendant Mardian is now entitled to a new trial, this does not, for reasons discussed *infra*, alter our conclusion that interference with appellants' right to inspect and copy the tapes is not justified on the facts of this case.

[42] Brief of Appellee at 42, *quoting* Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952).

A portion of the news value of such materials may be irrevocably lost by even a temporary delay. *See* Nebraska Press Assn. v. Stuart, *supra* note 39, at 5156.

[43] Pretrial publication of information admitted at trial generally has been regarded as posing less of a threat to the impartiality of juries. *Compare, e.g.*, Stroble v. California, 343 U.S. 181, 195 (1952), *and* United States v. Persico, 425 F.2d

seek tape recordings from which inadmissible statements have been carefully eliminated. These tapes were played to the jury, and presumably will be replayed at any retrial.[44] The transcripts of these conversations have received wide circulation and have been reenacted in various forums.[45] We seriously question whether listening to the tapes prior to a retrial would render every listener incapable of "lay[ing] aside his impression or opinion and render[ing] a verdict based on the evidence presented in court." [46]

Finally, it is of no small significance that at the time the district court issued its opinion, neither the Govern-

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1375, 1380 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970), *with e.g.*, Marshall v. United States, 360 U.S. 310 (1959), *and* United States *ex rel.* Bloeth v. Deeno, 313 F.2d 364 (2d Cir.), *cert. denied*, 372 U.S. 978 (1963).

[44] We take judicial notice that while the appellants in United States v. Haldeman, *supra* note 2, contend that a proper foundation for the tapes was not established at their trial, Brief for Appellant Haldeman at 93-111, and while the admissibility of certain passages is contested, Brief for Appellant Mitchell at 122-51; Brief for Appellant Mardian at 62-84, they are not generally challenging the admissibility of the tapes.

[45] Indeed, in one respect release of the tapes might diminish the possibility for prejudicial publicity by making unnecessary further reenactments of the conversations, which inevitably involve verbal interpretations of the speakers' meaning. *Cf.* Nebraska Press Assn. v. Stuart, *supra* note 39, at 5158 (rumors may be more damaging than reasonably accurate news reports).

[46] Irvin v. Doud, 366 U.S. 717, 722-23 (1961). Indeed, it seems likely that, without undue effort, it would be possible to empanel a jury whose members had never even heard the tapes. Despite the widespread publicity the "Watergate affair" had received prior to the Watergate trial, 10 of the 12 jurors selected in that case claimed to have followed Watergate casually, if at all. *See* Brief of Appellee at 50 n.76, United States v. Haldeman, *supra* note 2 (citing transcript).

ment nor any of the Watergate defendants had objected to releasing the tapes.[47] The defendants' silence suggests that they did not believe their rights would be jeopardized, and their inaction surely would weigh against them were they later to challenge the impartiality of veniremen or jurors based upon exposure to the tapes.[48] Similarly, the Government's decision not to object suggests that it believed release would not make it impossible to empanel an impartial jury.

B

Appellants and appellee have briefed the question of whether the district court's decision is justified by a concern for the privacy of the persons whose conversations were taped or by the deference owed to presidential rec-

[47] Subsequently, defendant Haldeman has filed a one sentence statement expressing his belief that the tapes "should not be made public for the reason that such publicity would seriously jeopardize [his] rights to a fair trial in the event his pending appeal . . . results in a grant to him of a new trial." This pro forma statement hardly warrants careful attention. The Government has filed a two page memorandum which states that "[i]t is the belief of the United States that . . . there is little likelihood that republication of copies of the recordings in the future would preclude affording defendants a fair retrial. . . ." The Government adds, however, that it "is unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial." This qualification does not disturb our basic conclusion, that the Government does not anticipate that release of the tapes would preclude (or even seriously impede) the empaneling of an impartial jury in the event of a retrial.

It is instructive to observe that not even Mr. Nixon initially claimed that release of the tapes would prejudice a possible retrial; that issue was raised by the district court *sua sponte*.

[48] *See, e.g.*, Darcy v. Handy, 351 U.S. 454, 463 (1956); Stroble v. California, 343 U.S. 181, 193-94 (1952).

ords. That question, however, is not raised by this record. Although Judge Sirica referred to these considerations,[49] he did not base his decision upon them, presumably because Judge Gesell earlier had ruled that they did *not* justify denying access to the tapes.[50] The "narrow issue" before Judge Sirica was "the timing of the release."[51] The privacy and presidential deference considerations appellee relies upon essentially are not relevant to that issue. Thus, the only remaining question is whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes.[52] We answer that question in the negative.

[49] 397 F.Supp. at 188. Judge Sirica's reference to the possibility of "mass merchandising techniques designed to generate excitement in an air of ridicule" plainly comes in the context of his discussion of the rights of the Watergate defendants. *Id.* His discussion of the deference owed Presidential tapes admittedly is more difficult to explain.

[50] 386 F.Supp. at 642. Judge Gesell's decision was the law of the case, and thus was presumptively controlling, *See, e.g.*, Greater Boston Television Corp. v. FCC, 463 F.2d 268, 279 & n.20 (D.C.Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); 1B J. MOORE, *supra* note 35, at ¶ 0.404 (1965).

[51] 397 F.Supp. at 187.

[52] Even this question technically is not before us, since Mr. Nixon has not filed a cross-appeal. But because the relevance of privacy and Presidential deference considerations have been briefed, we feel justified, in the interest of expedition, in discussing the issue.

To some extent, the evils appellee fears may be minimized by the final plan for release of the tapes approved by the district court. The court's power to control the uses to which the tapes are put *once released*, however, is sharply limited by the First Amendment. *See* Nebraska Press Association v. Stuart, *supra* note 39, at 5155, 5158; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

1. Privacy Considerations.—Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum. Rather, appellee seeks to avoid only what he terms "intrusion on the sensibilities of those whose voices appear on the tapes." [53] But as appellee concedes, this is not the type of injury against which the law provides protection.[54] The fact that neither the legislatures nor the courts have felt this interest worthy of protection suggests that it is not a substantial basis for infringing the common law right to inspect judicial records.

But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed. If preventing this "injury" justifies interfering with the public's right to inspect records, then the common law right can always be defeated in criminal cases.[55]

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[53] Brief at 47; *see id.* at 49.

[54] *Id.* at 49 n.22; *see, e.g.*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493-94 & sources cited (1975).

[55] As the Senate Committee on Government Operations stated, in disapproving proposed G.S.A. regulations, Public Access Regulations § 105-63.402-1(b) (March 19, 1975), reserving to the Administrator the right to restrict access to embarrassing portions of President Nixon's papers taken by G.S.A. pursuant to the Presidential Recordings and Material Preservation Act, Pub.L. 93-526, 88 Stat. 1695, 44 U.S.C.A. § 2107 note (Supp. 1976): "Almost by definition, the Watergate affairs are embarrassing, to those who were associated with them." S. Rep. No. 94-368 at 10, 94th Cong., 1st Sess. (1975).

Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency, and thus they are both impressed with the "public trust," [56] and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential recordings and Material Preservation Act, the words and sounds at issue here will find a further entry way into the public domain.[57]

Significantly, under the regulations recently proposed, access to the Nixon papers can be restricted only if release "would constitute a clearly unwarranted invasion of personal privacy or constitute libel or slander of a living person." Public Access Regulations § 105-63.402-1(b) (April 13, 1976). The Senate rejected almost identical language, Public Access Regulations § 105-63.402-1(b) (Oct. 15, 1975), when submitted in the second draft, S. Res. 428, 122 Cong. Rec. S5290-91 (daily ed. April 8, 1976); whether the Senate will continue to insist on its even more open proposal, S. Rep. No. 94-368, *supra*, remains to be seen.

[56] Nixon v. Administrator of General Services Administration, 408 F.Supp. 321, 358 (D.D.C.), *appeal docketed*, 44 U.S.L.W. 3641 (U.S. May 11, 1976) (No. 75-1605); *see id.* at 358-59 & n. 53.

[57] *See* note 55 *supra*. As Judge Siricia noted, because of the litigation over the constitutionality of the Act and the time necessary for processing the tapes and papers, release will not be immediate. In addition, once the tapes are made public, there may still be a ban on copying them. That ban will not be for four years as it appeared when Judge Sirica wrote his

For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy.

2. Deference to Presidential Conversations.—In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court spoke of the "high degree of deference" owed to Presidential conversations.[58] The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to provide "protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."[59] Thus the Court stated,[60]

> [T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible*, are accorded that high degree of respect . . . .

And again:[61]

> [T]he District Judge will at all times accord to Presidential records that high decree of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden*

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opinion, *see* Regulations on Access § 105-63.404(c) (March 19, 1975); the Senate rejected that proposed regulation as inconsistent with the spirit of the Act, S. Res. 244, 121 Cong. Rec. S15808-08 (daily ed. September 11, 1975); *see* S. Rep. No. 94-368, at 12-13 94th Cong., 1st Sess. (1975). The newer regulations provide for a two-year ban, Public Access Regulations § 105-63.404(c) (April 13, 1976); whether the Senate will accept this shorter period is uncertain.

[58] 418 U.S. at 715.

[59] *Id.* at 708; *see id.* at 711-12.

[60] *Id.* at 714-15 (emphasis added).

[61] *Id.* at 715-16 (emphasis added).

> *applies with even greater force to excised material.*
> . . .

By definition, however, the tapes played at trial are no longer confidential. Thus appellee is left to argue that somehow it would be "unseemly" to allow tapes of White House conversations to be marketed and publicly distributed. But this is essentially a question of taste, and provides a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recordings of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed. In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights.

IV

On remand, the parties and the court will have to attempt to develop a plan for release of the tapes. The principles governing release are well set out in Judge Gesell's initial opinion, and are essentially undisputed. Distribution should be prompt, and on an equal basis to all persons desiring copies. The court cannot be expected to assume the cost of distribution, nor should the court's time or personnel be unduly imposed upon. And neither the court, nor any agent it appoints, should profit from the public's exercise of its common law right. Within these broad limits, the court has considerable discretion.

MACKINNON, *Circuit Judge*, dissenting: In my view, at this time, we should affirm Judge Sirica in his decision refusing to permit a reproduction of portions of the tape *exhibits* until the appeals in the relevant cases are decided and the criminal charges disposed of by a final judgment.[1] Access to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony. Physical exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished.[2] The fact that property is used as evidence in a court trial does not divest the owner of his title to it. Also, there is an integrity about real exhibits that needs to be protected until the exhibit is no longer needed *in court*. Tapes are especially subject to the possibility of alteration and erasure, as we all know from the incidents involving these tapes, and should not be subjected to any unnecessary handling that might damage them or constitute good cause in a subsequent trial for a court to reject them as unreliable evidence. Until the criminal trials where these tapes may be used as evidence are completely final and further need for the exhibit is foreclosed, courts and the Government should be concerned that they do not become a party to manufacturing presumptive prejudice against defendants.[3] In view of the possibility of a retrial following the reversal by this court of the Mardian conviction, and the strong possibility of petitions for certiorari that would cause the other convictions to lack finality until the Supreme Court finally rules, it is my opinion that Judge Sirica made a wise decision in refusing the requested reproduction of portions of these exhibits.[4] A significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains.[5]

I respectfully dissent.

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[1] Thereafter, I would not worry about possible collateral attacks.

[2] *Cf.* United States v. Wilson, —— U.S.App.D.C. ——, —— F.2d —— (No. 75-1713, June 28, 1976).

[3] Murphy v. Florida, 421 U.S. 794 (1975); Marshall v. United States, 360 U.S. 310 (1959).

[4] This case involves a situation where the trial judge acted to assure the integrity of a vital trial exhibit until it was no longer needed for trial purposes. On that basis it is distinguishable from the two cases cited in n.39 in the court's opinion which did not involve exhibits that might be altered or destroyed by handling, *i.e.*: In re Washington Post Company, No. 76-1695 (4th Cir., July 21, 1976) and Miami Herald Pub. Co. v. Collazo, No. 75-649 (Fla. Dist. Ct. App., March 9, 1976). It is doubtful that any person would consider the cases here to involve "borderline situations."

[5] *Cf.* Majority opinion, n.41. Now that the conviction of Mardian has been reversed, the majority opinion reflects a lack of concern for the prejudice it may cause to such defendant when it states that "the very fact that a second trial is *only* a possibility makes the interest in preventing prejudicial publicity *less than compelling*." Majority opinion, p. 17 (emphasis added).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409 September Term, 1976
Misc. 74-128

United States of America
v.
John Mitchell, et al.
In Re: National Broadcasting Company, Inc., et al.,
Appellants

No. 75-1410 Misc. 74-128

United States of America
v.
John Mitchell, et al.
Warner Communications, Inc.,
Appellant

Before: Bazelon, Chief Judge; MacKinnon, Circuit Judge and Merhige*, United States District Judge for the Eastern District of Virginia

[December 3, 1976]

ORDER

On consideration of the petition of respondent Richard Nixon for rehearing, it is

ORDERED by the Court that the aforesaid petition for rehearing is denied.

Per Curiam

*Sitting by designation pursuant to Title 28 U.S.C. §292(d).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	]	
v.	]	Misc. No. 74-128
JOHN N. MITCHELL, ET AL.,	]	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	]	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court solely for consideration of the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110. Since this case was returned to the Court by Judge Gesell on January 8, 1975, the Court has given serious consideration to this issue.

As noted by Judge Gesell in his Memorandum and Order of December 5, 1974, and as further indicated in his Order of January 8, 1975, there are several obstacles which must be overcome before the tapes might be released. Because of the difficulties which Judge Gesell anticipated, including such problems as administration, funds, technology and manpower, he ordered that no attempt to copy the tapes should be made "until after

the trial." (Memorandum and Order, December 5, 1974, at 7.)

This Court, as the trial court, is well aware of the many problems that must be resolved before any Presidential tapes might be reproduced and distributed to the public at large. At present the Court is seriously concerned about the problem of the timing of any release or reproduction of the tapes. On March 6, 1975, the Court presided at a hearing at which counsel for the applicants, as well as Mr. Nixon's attorney and a representative of the Watergate Special Prosecution Force addressed this single issue. At the Court's request briefs were submitted thereafter and the Court took the matter under advisement.

All four defendants convicted in the aforementioned criminal trial have filed notices of appeal in the U.S. Court of Appeals for the District of Columbia. Should one or more of the defendants prevail on appeal the case might have to be retried, which would mean that a new jury would have to be empanelled and the evidence resubmitted. Thus, the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence. Absent some compelling reason, the Court should not take any action which carries the risk of causing possible prejudice to the rights of the defendants should a retrial be necessary.

This much would be expected of any judge and, indeed, no less has been specifically required of this Court by the Supreme Court's opinion of July 24, 1974, in *United States v. Nixon*, ___ U.S. ___ ; 94 S.Ct. 3090 (1974). After a careful review of the very sensitive matter of requiring a President to produce, pursuant subpoena, information which he claimed was privileged, the Supreme Court held that the subpoenaed presidential

tapes had to be produced by President Nixon for *in camera* judicial inspection. Then the high Court turned to the matter of the enforcement of the subpoena by this Court. Again it stressed the sensitive nature of the presidential tapes, particularly the privileged or otherwise inadmissible or irrelevant portions, and noted: "We have no doubt that the District Judge will *at all times* accord to presidential records that high degree of deference suggested in *United States v. Burr* [, 25 Fed. Cas. 30 (No. 14,692d) (1807)]. . . ." *Id.* at 3111. (Italics added.) It is in the light of this solemn responsibility as well as a concern for the rights of the defendants that the applicants' request for immediate access to the tapes must be examined.

Mr. Nixon's attorneys point out that the release of the tapes for reproduction and distribution envisioned by the applicants and their friends would result in the manufacture of permanent phonograph records and tape recordings, perhaps with commentary by journalists or entertainers; marketing of the tapes would probably involve mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales. It is further implied that the tape copies would be put to untold varieties of inappropriate and scandalous uses, just as any other commercial recording would be. Thus, it appears to the Court that the rights of the appellants in the criminal case (and many others), might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes.

The Court is not unmindful of the applicants' positions. However, the authorities and arguments cited by the plaintiffs focus more on the problems of continuing (post-trial) restraints on speech and publication like "gag orders" (and the Court lifted such a restriction in the *Mitchell* case the day the verdict was

rendered) than on the problems in delaying the possible release for production and distribution of presidential tapes received in evidence.

Furthermore, it bears noting that the transcripts of the desired tapes were made available to the public at the same time the tapes were played to the jury. In light of this fact, the argument that the public's "right to know" presents a compelling reason for granting immediate access to the tapes must be rejected.

Finally, the Court notes that under Section 104(a) of the Presidential Recordings and Material Preservation Act, Public Law 93-526, December 19, 1974, the Administrator of the General Services Administration was required to submit to the Congress a report proposing and explaining regulations that would provide public access to virtually all of the tape recordings made by and during the administration of former President Nixon. That report was given to the Congress on March 19, 1975.

Section E of the Report deals with the problems involved in the processing of White House tapes. There are approximately 5,000 hours of conversations recorded. The administrator notes that about one-third of the tapes were recorded during the nine months in which some abuse of governmental power may have been discussed and that the tapes for those months will be processed first. He estimates that it will take a year to completely process this first group of tapes (and that it will be six months before any part of them will be released). It will take two more years to finish processing the rest of the tapes. Thus, it will take an estimated three years just to process all the tapes. And it is further estimated that the processing will not even begin for a year and a half. Thus, the Administrator estimates that it will be two years

before even the first segments of those tapes will be made available for the public to hear.*

As for making copies of the tapes available to the public, the Administrator states:

> [I]n order to prevent unwarranted commercialization, the public will not be allowed to duplicate or buy copies of the tapes during the 3-year processing period. After that time, the Administrator will review the situation to determine whether it is appropriate to allow reproduction of the tapes. General Services Administration, *Report To Congress On Title I*, E-9 (March, 1975).

While it is questionable whether the Report and Regulations apply to the tapes played during the *Mitchell* trial and at issue here, (see generally *Id.* at E-8) nevertheless, the scheduling and timing of the release of the presidential tapes under the Regulations is a very helpful point of reference. Since it will be approximately two years before any presidential tapes will even be made available to the public to listen to under the G.S.A. plan; and since it will be four and one-half years before the Administrator will even consider whether it might be appropriate to make copies of the presidential tapes for public purchase, the Court can see no compelling reason why these tapes received in evidence should be immediately released for possible reproduction and distribution.

Upon careful consideration of these and other factors it is the conclusion of the Court that (1) until the appeals have been received, the trial of the criminal case is not over, at least for purposes of the release of the tapes received in evidence for copying and distribution; (2)

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*See Attachment A.

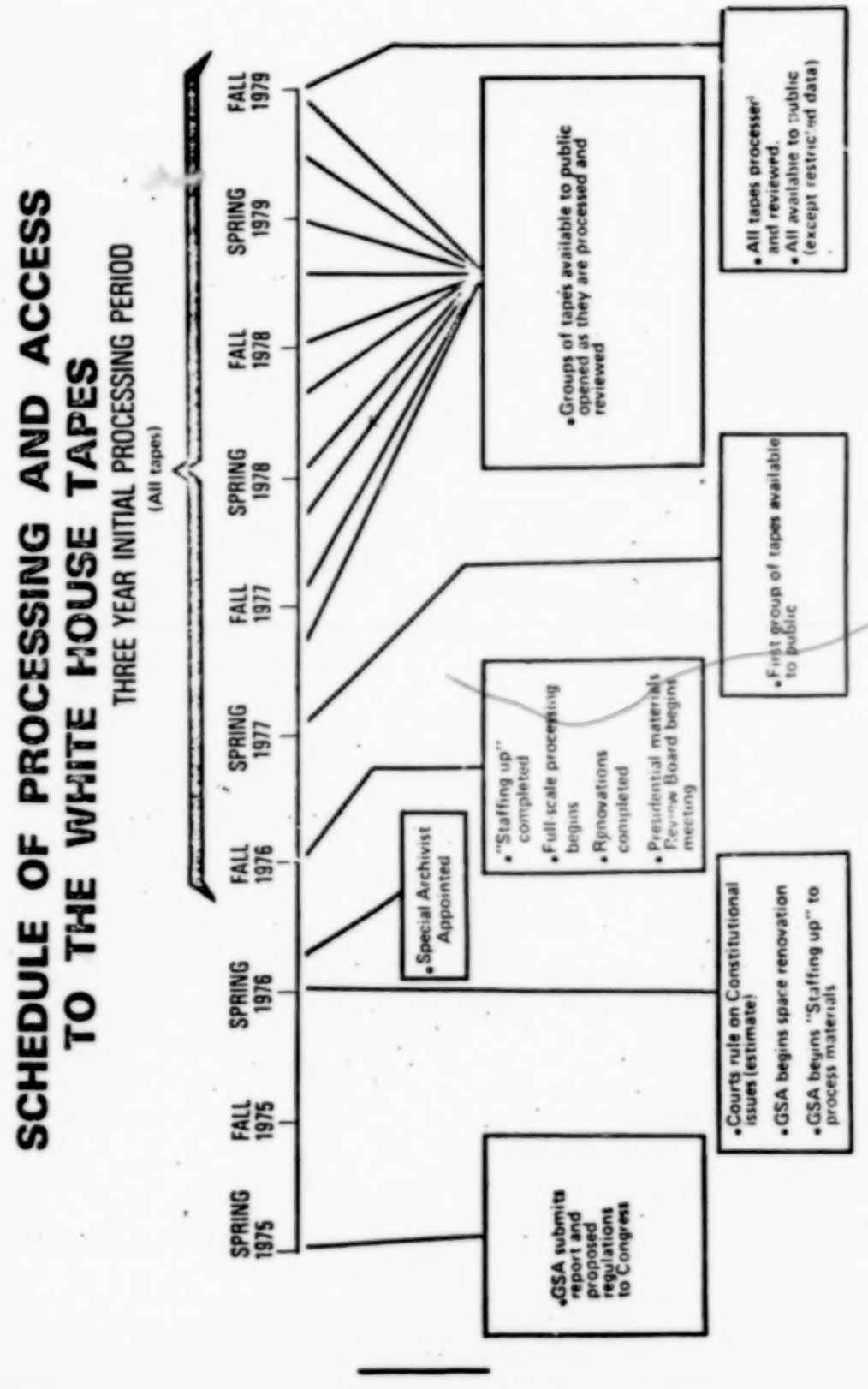
there is no compelling reason for the immediate release of the tapes for the above-stated purposes; and (3) no harm will be done if the possible release of the tapes and any further implementation of the December 5, 1974 Order is delayed until the appeals in the *Mitchell* case are decided.

Therefore, it is by the Court this 4th day of April, 1975,

ORDERED that the applicants' petitions for immediate access to the tapes for the purpose of making copies for public distribution be, and the same hereby are, denied without prejudice.

/s/John J. Sirica
United States District Judge

ATTACHMENT "A" (From G.S.A. Report of March 19,197



APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Misc. No. 74-128
JOHN D. MITCHELL, ET AL.	)	
	)	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	)	

MEMORANDUM AND ORDER

Several television and radio broadcasters noted in the caption moved pursuant to Rule 47 of the Federal Rules of Criminal Procedure requesting copies of those portions of taped conversations initially recorded in former President Nixon's offices which were subpoenaed, received in evidence, and played to the jury in this widely publicized criminal case still on trial before Judge John J. Sirica. Copying would be accomplished at applicants' expense with the aid of the Clerk of Court from the evidentiary tapes. There would be no recording in the courtroom. Applicants propose to broadcast at least portions of the tapes locally and nationwide over both television and radio.

The reproduction of trial evidence received in tape form for subsequent public use raises an issue of first

impression in this District and the Clerk of Court, James F. Davey, properly seeks guidance from the Court. No published precedent directly in point has been cited or found in any other jurisdiction. The matter has been treated as a miscellaneous proceeding and separately assigned at Judge Sirica's request. All defendants and the Special Prosecutor have been served and the Court has before it various briefs and affidavits, including an affidavit from the Clerk of Court explaining some of the mechanical and administrative considerations presented. Former President Nixon, by his attorneys, opposes the motion. The Reporters' Committee for Freedom of the Press has been granted permission to file a brief amicus.*

Applicants claim a constitutional right to reproduction of the tapes under the First Amendment to the Constitution. This claim is wholly without merit. A public trial is taking place, all media, including applicants, have been present, and, by order of the trial judge, provided with earphones to enable their representatives to hear exactly what the jury heard when the tapes were actually played in the courtroom. There were no restraints placed on their subsequent reporting. Indeed, the contents of the tapes have been fully reported and written transcripts were made available to all media to assure reasonable accuracy.

The Supreme Court has repeatedly held in recent years, although admittedly by split votes, that members of the press are not constitutionally guaranteed a "right of access" greater than that afforded the general public. *Pell v. Procunier*, 94 S. Ct. 2800, 2810 (1974); *Saxbe v. Washington Post*, 94 S. Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-5 (1972); *Estes v. Texas*, 381

*In addition, the Mutual Broadcasting System, Inc. has made separate application in letter form.

U.S. 532, 540 (1965). *See also,* Address of Mr. Justice Stewart, "Or of the Press." Yale Law School Sesquicentennial Convocation, Nov. 2, 1974, at p. 9:

> So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. There is no constitutional right to have access to particular government information or to require openness from the bureaucracy.... The Constitution, in other words, establishes the contest, not its resolution.

The question presented by the applications then boils down to a far simpler issue. Are representatives of broadcast media entitled along with the general public to aural copies of exhibits after they have been received in evidence in a criminal trial as a normal concomitant of the constitutional requirements of a public trial found in the Sixth Amendment to the Constitution?

As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh,* 2 App. D.C. 404, 407 (1894). *See also, United States v. Burka,* 289 A.2d 376 (1972); *Belt v. Pr. George's County Abstract Co.,* 73 Md. 289, 20 A. 982 (1890).

The Court stated in *Drawbaugh,*

> ...any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice.

2 App. D.C. at 407-8. This proposition applies without a showing of a particular "legitimate interest" in the records requested. *In re Mosher,* 248 F.2d 956, 958 (C.C. P.A. 1957).*

In this particular instance this general right to have access and copy exhibits is especially reinforced by directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. §457. The Clerks of Court for District Courts throughout the United States are specifically instructed to retain on file for public inspection for ten years documentation in cases of significant historical importance and then to deposit such materials with the Federal Records Center under the aegis of the General Services Administration for subsequent

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*The supposed requirement of English common law that one have a personal "legitimate interest" in judicial records before access would be granted was in fact simply a requirement of standing to sue to enforce the right in mandamus where access had been wrongfully denied. See Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749, 60 A.L.R. 1351 (1928). No one in this instance has been denied access to copy the tapes in evidence.

In this jurisdiction the practice has been to make court documents available without a showing of "special interest." Were this an action in mandamus, rather than an application to instruct the Clerk as to Court policy, the media would have standing to compel equal protection of their right of access consistent with that routinely accorded other members of the public. McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir.), *cert. denied,* 342 U.S. 894 (1951).

years under the guidelines set by 44 U.S.C. §3301 and the implementing regulations appearing at 41 C.F.R. §§101-11.101 et seq. The *Manual for the Clerks of the United States District Courts,* Chapter 13, Exhibit 2, (Ref. 1301.4) at pp. 4-5, item 6(a) (1954), directs, among other things, that "case papers and documentary exhibits" filed in criminal cases involving the President or officials appointed by the President must not be disposed of even after ten years. Cases of this type are considered to contain "documentary evidence of movements of historical forces" and "biographical data" of obvious importance for persons interested in "social, economic and political research." *Ibid.,* note to item 6, p. 16.

Thus there is congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels. It should be noted that Warner Communications, Inc. by its separate application specifically requests access in order to disseminate permanent phonograph and tape recordings of evidentiary tapes for use in homes, libraries and schools.

Neither the defendants in this case nor the Special Prosecutor object to release of the tapes, nor has Judge Sirica indicated any reason to deviate from general practice in this instance in the interests of a fair trial. Former President Nixon does object. He seeks to avoid embarrassment and wide publicity, asserting that he still has a property right in the tapes and accordingly a privilege against disclosure, except to the extent that that privilege has been invaded by the doctrine of *United States v. Nixon,* 94 S. Ct. 3090 (1974). Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the

theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality "consistent with the fair administration of justice." *United States v. Nixon, supra,* 94 S. Ct. at 3111. His words cannot be retrieved; they are public property and his opposition is accordingly rejected.

It should be understood that the Court is not called upon or in any way attempting to decide whether or not the dissemination of the tapes to the public is or is not desirable. On the one hand, much has been already printed; on the other, the aural atmosphere, emphasis and connotations of the taped discussions may be peculiarly illuminating. The law must be applied and the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them. Whether any individual affected has a right under the law of privacy or related doctrines against anyone who thereafter republishes is not to be determined here. *See, e.g., Melvin v. Reid,* 112 Cal. App. 285, 297 P. 91, 93 (1931); *Briscoe v. Reader's Digest Assn.,* 93 Cal. Rptr. 866, 483 P.2d 34 (1971); *Restatement (I) of Torts,* §867, Comment C (1939).

The courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust. As the Supreme Court has succinctly stated, "what transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Only in this fashion can arbitrary judicial authority be prevented.

Before the tapes can be released, certain immediate obstacles must be overcome. Because the tapes contain material that was not played to the jury, they will have to be rerun to remove the excluded material. There is need, as the Special Prosecutor points out, to preserve the integrity of the tapes as received in evidence during the reproduction process. Considerable time, perhaps running as much as several weeks, will be required to reproduce them. Court personnel and experts now fully committed to the trial must be consulted. Because of these administrative and mechanical difficulties no attempt should be made to provide verbatim sound copies, in addition to the transcript copies already provided, until after the trial.

If and when released, there will be a broad demand for copies, as witnessed by the applications already filed, when availability becomes better known. The office of the Clerk of Court is not equipped with trained personnel or facilities allowing it to become involved in any mass release of numerous copies of the tapes, even at the expense of applicants. Furthermore, if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence. Clearly, all persons, whether or not members of

the press, desiring copies must be accommodated without special favoritism or priority.

There is time between now and the end of the trial to determine whether a satisfactory mechanism and procedure can be evolved which will permit the Court to prepare only a single copy of the tapes as played and then place its subsequent reproduction and distribution in the responsible hands of an organization, agency or person which, without profit, can, for a defined limited period, assure fair and equitable distribution to all categories of applicants. Without in any way indicating whether it is practical or possible to release aural copies in addition to the transcripts already released, the Court solicits any suggestions which the Special Prosecutor, the defendants or applicants may have as to an appropriate method for facilitating a release which is consistent with the considerations enumerated generally above. Suggestions should be submitted in concrete detail and filed with the Clerk of Court on or before January 3, 1975.

In the meantime, the Clerk shall upon completion of the trial promptly proceed to reproduce a single set of the tapes in evidence which shall contain only those portions played to the jury during trial. He shall consult with expert personnel to assure accuracy of this reproduction and to avoid compromising the evidentiary value of the exhibit in any respect. He shall advise the Court when this task is completed and withhold the reproduced tapes from public inspection until further order of the Court. Final action on the applications will be taken at a later date in the light of developments. The opposition filed on behalf of former President Nixon is denied.

SO ORDERED.

December 5, 1974.

/s/Gerald S. Gesell
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Misc. No. 74-128
JOHN MITCHELL, ET AL.	)	
	)	
IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; and WARNER COMMUNICATIONS, INC.	)	

ORDER

The Court has considered the joint proposals of the original applicants submitted by their attorneys in an effort to meet the considerations outlined on page seven of the Court's Memorandum and Order of December 5, 1974. The proposals will not be accepted.

The burden is upon the applicants to come forward with a satisfactory plan to be administered without profit by some responsible agency or person other than the Clerk of Court. It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized. Applicants have failed even to consider these matters. Moreover they suggest no responsible agency or person to administer the plan and merely undertake to place all of these problems back on the Court, which is not equipped with necessary funds, technology or manpower.

All pending applications are at this stage denied without prejudice and the matter is transferred back to

Judge Sirica, with his approval, for any further action that may be appropriate in the premises at some later date.

/s/Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

January 8, 1975.

APPENDIX E

October 2, 1974

Mr. Fred Graham
CBS News
2020 M Street, N. W.
Washington, D. C.

Dear Fred:

This comes in response to your letter of September 17th on behalf of yourself, Carl Stern and David Schoumacher.

I have carefully considered each of the three requests you made. As regards the first, I intend to file an order in the near future clarifying the order of March 1st which prohibits extra-judicial statements by subpoenaed witnesses. The clarification will relieve a witness from that restriction once he or she has been excused.

Concerning the transcripts of recorded conversations, I understand that the government intends to offer transcripts not as evidence, but as aids to the jury in listening to any tapes that may be admitted into evidence. Whether transcripts will be used in this manner is still an open question. In the meantime, I cannot respond to your request for copies.

Finally, I have consulted with various other judges of this court concerning the release of tape recordings that are introduced as evidence. I have enclosed a copy of a memorandum to me from Chief Judge Hart which describes the consensus of opinion on this subject among the judges, a consensus with which I agree. I have

therefore decided not to release any tapes or copies of tapes.

Sincerely yours,
/s/John J. Sirica

Enclosure
cc: Carl Stern
David Schoumacher
Sid Davis

United States District Court
for the District of Columbia
Washington, D. C. 20001

September 18, 1974

MEMORANDUM:

TO: Judge Sirica

Reference is made to your memorandum to me of this date, concerning Mr. Graham's request made on behalf of CBS, NBC and ABC that copies of any tape recordings admitted into evidence be made available to news media representatives during the trial. The purpose of this is to permit the news media to actually broadcast the tapes in question.

I have consulted with many of the Judges of this Court concerning your memorandum and I beg to advise you that we unanimously agree as follows:

1. The ultimate decision as to whether these tapes be made available or not must be up to the Trial Judge.

2. The most troublesome aspect of this proposal in many ways is that there would be played on the electronic media a precise reproduction of what occurred

in Court when the tape was played. We have staunchly opposed, as you know, any broadcasting of Court proceedings. In a sense, if we allow replay of what occurred in Court, it will be very difficult to explain why we will not let a tape recorder be used by a court reporter to replay the entire proceedings.

3. As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained.

/s/George H. Hart, Jr.
Chief Judge

APPENDIX F

Record Group 267
Job No. NN369-89

GENERAL SERVICES ADMINISTRATION

Accession Inventory

Source: Supreme Court of the United States

Location: Supreme Court Building
1 First Street, NE
Washington, DC 20543

The following Accession Inventory is hereby agreed to by the undersigned duly authorized representatives of the agency named above and of the Archivist of the United States, respectively; and the records are accepted for deposit with the National Archives of the United States.

Description of Records: Audiotape recordings of oral arguments before the Supreme Court during the 1972 term. Tapes are numbered from 883-900 and 1-26. Special items include tape 889A Justice Harlan Memorial Service and tape 899A Justice James Byrnes Memorial Service. Note also that tape 900 has three reels and tape 1, 2, and 3 are composed of four reels each.

Restrictions on the Use of Records: (a) The tapes may be played for Federal personnel in connection with official duties and to the general public for serious scholarly and legal research. (b) Typewritten transcriptions of the oral arguments may be furnished to these persons at a fee provided that, in each instance, three copies of these transcriptions are deposited in the Library of the Court. (c) Copies of the tapes may not be furnished to persons other than the Justices without the permission of the Marshal of the Court, and unless three years shall have

expired since the argument of a recorded case. (d) The National Archives may not identify the voices of members of the Court in connection with any use of the tapes, either when they are being played or in making or furnishing transcriptions. (e) Copies of the tapes will not be reproduced for commercial purposes.

Executed in duplicate at Washington, DC., this 9th day of April, 1974 A.D.

/s/F. M. Hepler
Representing the Supreme Court
of the United States

/s/James W. Moore
Representing the Archivist
of the United States

Supreme Court, U. S.
FILED
MAY 12 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D.C. • THIEL PRESS • (202) 638-4521

PETITION FOR CERTIORARI FILED JANUARY 7, 1977

CERTIORARI GRANTED MARCH 28, 1977

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APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 75-1409

United States of America

v.

John Mitchell, et al.

In re: National Broadcasting Company, Inc., et al., Appellants

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United States Court of Appeals
for the District of Columbia Circuit

No. 75-1410

United States of America

v.

John Mitchell, et al.

Warner Communications, Inc., Appellant

Date	Proceedings
1975	
April 25	Certified Original Record (no transcript)
June 24	Memorandum of position of Appellee, Harry Robbins Haldeman
1976	
Feb. 20	Argued before CJ Bazelon; MacKinnon, CJ and Robert H. Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation
Oct. 26	Opinion for the Court filed by Chief Judge Bazelon
Oct. 26	Dissenting opinion filed by Circuit Judge MacKinnon
Oct. 26	Judgment reversing and remanding case to the District Court
Nov. 5	Appellee's (Nixon) petition for rehearing and suggestion for rehearing en banc
Dec. 3	Per Curiam order that the petition for rehearing is denied; CJ Bazelon; MacKinnon, CJ and Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation
Dec. 3	Per Curiam order en banc that the suggestion for rehearing en banc is denied; CJ Bazelon; Wright McGowan, Leventhal, Robinson and MacKinnon, CJ
Dec. 9	Appellee's (Nixon) motion for stay of mandate
Dec. 10	Per Curiam order that the motion of respondent Nixon for stay of mandate is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a

period of 30 days from the date of this order and during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution in accord with this Court's opinion of October 26, 1976; CJ Bazelon; MacKinnon, CJ and Merhige, U.S. District Judge for the Eastern District of Virginia, sitting by designation; Circuit Judge MacKinnon would not remand the record

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 74-128

United States of America,

v.

John Mitchell, et al.

Date	Proceedings
1974	
Nov. 12	Application of National Broadcasting Company, Inc. and others for an order permitting movants to have access to and make copies of certain tape recordings; P&A; affidavit; c/m 11-12-74
Nov. 13	Application of Public Broadcasting Service to join the request of National Broadcasting Company, Inc.; c/m 11-13-74
Nov. 13	Affidavit of Fred Graham in support of Motion of National Broadcasting System,

Date	Proceedings
	Inc. for an order releasing certain tapes. c/ser 11-13-74
Nov. 19	Order directing Clerk of Court to transfer to Misc. Case No. 74-128, without refiling, the application, motion & all supporting papers filed by certain television & radio broadcasters in Crim. Case No. 74-110, and further directing that any person served with the application who desires to support or oppose so indicate by filing written notice with the Clerk of Court within seven (7) days from the date of this Order, & to submit with such notice in affidavit form any pertinent supporting information. Sirica, J.
Nov. 19	Order specially assigning Misc. Case No. 74-128 to Judge Gerhard A. Gesell for all purposes. Hart, C.J.
Nov. 19	Order directing the Clerk of Court to prepare a statement in affidavit form detailing the mechanical procedure followed during certain aspects of the trial in Cr. 74-110. Gesell, J.
Nov. 26	Affidavit of James F. Davey, Clerk of the United States District Court for the District of Columbia; c/s 11-26-74.
Nov. 26	Memorandum of the United States in response to application of Broadcasting Companies; c/m 11-26-74.
Nov. 26	Opposition of Richard Nixon to application of Broadcasting Companies for copies of Presidential Recordings; c/m

Date	Proceedings
	11-26-74. (app. Raymond G. Larroca 1320–19th Street, N.W. Suite 500, 20086)
Dec. 2	Application of Warner Communications, Inc. for permission to copy tape recordings in evidence; P&A; affidavit of Fred W. Friendly; affidavit of David H. Horowitz; request for oral hearing; c/m 12-2-74. (app. of Joseph A. Califano, Jr. and Richard M. Cooper, 1000 Hill Bldg. 20006)
Dec. 5	Memorandum & Order granting application of National Broadcasting Co., Inc., et al for the reproduction of certain tapes used in the trial in Criminal No. 74-110; suggestions as to an appropriate method for facilitating release of a copy of tapes to be submitted & filed with the Clerk of the Court by 1-3-75; setting for the directives to the Clerk of the Court; denying the opposition of said application by former President Nixon. Gesell, J.
Dec. 13	Corrected entry of 12-5-74, Memorandum & order holding in abeyance ruling on application of National Broadcasting Co., Inc., et al, for the reproduction of certain tapes used in the trial in Cr #74-110; Suggestions as to an appropriate method for facilitating release of a copy of tapes to be submitted & filed with the Clerk of the Court by 1-3-75; Setting forth directives to the

Date Proceedings

Clerk of the Court; Denying the opposition of said application by former President Nixon. Gesell, J.

Dec. 27 Memorandum of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS, INC., Radio Television News Directors Association, Public Broadcasting Service and Warner Communications, Inc. on implementation of the Court's memorandum and order of December 5, 1974; c/s 12-27-74.

1975

Jan. 8 Order denying all pending applications re tapes without prejudice and transferring matter back to Judge Sirica for any further action. Gesell, J.

March 6 Further hearing on application of movants for an order permitting movants to have access to and make copies of certain tapes pertaining to Cr. No. 74-110 argued and taken under advisement. (Counsel to submit supporting beliefs within one week). Sirica, J.

March 13 Memorandum of Richard Nixon on advisability of release of tape recordings during pendency of criminal appeals; Exhibit A; c/m 3/13/75.

March 13 Memorandum of National Broadcasting Companies, Inc., American Broadcasting Companies, Inc., CBS Inc., Radio Television News Directors Associa-

Date Proceedings

tion and Public Broadcasting Service pursuant to Request of Court, c/m 3/13/75.

March 13 Memorandum of Warner Communications, Inc. in support of its application to copy certain tapes; Affidavits (13); c/m 3/13/75.

March 14 Affidavit of Carol H. Falk; c/m 3/14/75.

March 19 Supplementary appendix to memorandum of Warner Communications, Inc. in further support of its application to copy the tapes received in evidence and played to the jury; c/m 3-19-75.

March 25 Correction of appendix to memorandum of Warner Communications, Inc. in further support of its application to copy the tapes received in evidence and played to the jury; c/m 3-25-75.

April 4 Memorandum Opinion and Order denying petitions of applicants for immediate access to tapes for purpose of making copies for public distribution without prejudice. Sirica, J.

April 23 Notice of appeal by National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., Radio Television News Directors Association and Public Broadcasting Service from Order dated April 4, 1975. mailed to William G. Hundley, John J. Wilson, William S. Frates, David G. Bress, James F. Neal, Herbert J. Miller, Jr. and Joseph A. Califano, Jr.

Date	Proceedings
April 23	Notice of appeal by applicant, Warner Communications, Inc. from Order of April 4, 1975. Copies mailed to William G. Hundley, John J. Wilson, William S. Frates, David G. Bress, James F. Neal, Herbert J. Miller, Jr. and Floyd Abrams.

APPENDIX B

October 2, 1974

Mr. Fred Graham
CBS News
2020 M Street, N. W.
Washington, D. C.

Dear Fred:

This comes in response to your letter of September 17th on behalf of yourself, Carl Stern and David Schoumacher.

I have carefully considered each of the three requests you made. As regards the first, I intend to file an order in the near future clarifying the order of March 1st which prohibits extra-judicial statements by subpoenaed witnesses. The clarification will relieve a witness from that restriction once he or she has been excused.

Concerning the transcripts of recorded conversations, I understand that the government intends to offer transcripts not as evidence, but as aids to the jury in listening to any tapes that may be admitted into evidence. Whether transcripts will be used in this manner is still an open question. In the meantime, I cannot respond to your request for copies.

Finally, I have consulted with various other judges of this court concerning the release of tape recordings that are introduced as evidence. I have enclosed a copy of a memorandum to me from Chief Judge Hart which describes the consensus of opinion on this subject among the judges, a consensus with which I agree. I have

therefore decided not to release any tapes or copies of tapes.

Sincerely yours,
/s/John J. Sirica

Enclosure
cc: Carl Stern
David Schoumacher
Sid Davis

APPENDIX C

United States District Court
for the District of Columbia
Washington, D. C. 20001

September 18, 1974

MEMORANDUM:

TO: Judge Sirica

Reference is made to your memorandum to me of this date, concerning Mr. Graham's request made on behalf of CBS, NBC and ABC that copies of any tape recordings admitted into evidence be made available to news media representatives during the trial. The purpose of this is to permit the news media to actually broadcast the tapes in question.

I have consulted with many of the Judges of this Court concerning your memorandum and I beg to advise you that we unanimously agree as follows:

1. The ultimate decision as to whether these tapes be made available or not must be up to the Trial Judge.

2. The most troublesome aspect of this proposal in many ways is that there would be played on the electronic media a precise reproduction of what occurred

in Court when the tape was played. We have staunchly opposed, as you know, any broadcasting of Court proceedings. In a sense, if we allow replay of what occurred in Court, it will be very difficult to explain why we will not let a tape recorder be used by a court reporter to replay the entire proceedings.

3. As we understand it, actual verbatim transcripts will be exhibited and marked and available to the Press and that would appear to constitute more than adequate disclosure to the public of what the tapes contained.

/s/George H. Hart, Jr.
Chief Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and RADIO TELEVISION NEWS DIRECTORS ASSOCIATION.

APPLICATION OF NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC. and RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., and Radio Television News Directors Association hereby move this Court pursuant to Rule 47 of the Federal Rules of Criminal Procedure for an Order permitting Movants to have access to and make copies of those tape recordings introduced in evidence and played to the jury in open court, in the above-entitled action, for the purpose of broadcasting said tape recordings to the public.

As grounds therefor your Movants assert that under the First and Sixth Amendments to the United States Constitution, they should be permitted to broadcast to the public such tapes as have been introduced in evidence, all of which is more fully set forth in the attached Memorandum of Points and Authorities, which is incorporated herein and to be read as a part hereof.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

Cahill Gordon & Reindel
Attorneys for Movants
Suite 500
Federal Bar Building West
1819 H Street, N.W.
Washington, D. C. 20006

OF COUNSEL:

National Broadcasting Company, Inc.
Corydon B. Dunham
Vice President and General Counsel
30 Rockefeller Plaza
New York, New York 10020

American Broadcasting Companies, Inc.
Bergson, Borkland, Margolis & Adler
21 DuPont Circle, N.W.
Washington, D.C. 20036

CBS Inc.
Ralph E. Goldberg
General Attorney
51 West 52nd Street
New York, New York 10019

Radio Television News Directors Association
J. Laurent Scharff
Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD C. WALD

RICHARD C. WALD, being duly sworn, deposes and says:

1. I am the president of NBC News, the News Division of the National Broadcasting Company, Inc. ("NBC"). I make this affidavit in support of the application by NBC and other broadcasters for access to and the right to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial for the purpose of broadcasting the tapes to the public.

2. It has always seemed to me that journalism is less a profession than a skilled trade practised by men and women of varying talents, moved forward occasionally by journeymen of genius. And, within a broad range of developed tradition, it changes as technology changes—and as the laws change. There is a connecting, developing line that links all of us in this trade to scribes, to printers, to line-cut illustrators and to the pioneers in flash powder and in sound. Whatever medium we work in, we are aware of and shaped by the other media whose reports become part of the public consciousness of events.

3. Hand in hand with the development of how we practise our trade has been the development of the matter itself, the stuff we deal with. Journalism has a

more conscious sense today of being connected closely to history, to sociology, to science, than it ever had before. And in recent years, its role in relation to government has been at issue, both as to what is reported and how it is reported. We started our reporting of the courts more than two centuries ago, and, while there is great agreement that only the direst of necessity should keep even part of a trial hidden from the public, there are still areas of difficulty and question in the relations of the bench and the fourth estate.

4. In the course of the trial before the Court, the Court has necessarily begun to deal with new technologies that are not exactly defined in precedents. The *right* to reproduce a document from a court trial arose at about the same time as the *ability* to reproduce it in print. As the right became firmly established in the principle of open trial, the practice of using bits of the documentary evidence in reporting was widely followed. When technology went forward and photography became widely spread, a photograph introduced in evidence in a court could be reproduced in news reports of what happened—and indeed, photographs were so reproduced. If a statue became a piece of evidence, and anyone were interested in it, it could be reproduced for general distribution.

5. Now we have entered a new phase. This Court is dealing in audio tapes that are introduced in evidence presumably because they are spoken documents, at least as valuable as printed ones, carrying with them an accurate reflection of the tones and the expressive qualifies of the people who made them. (Indeed, there has been a suggestion that former President Nixon might be making a deposition on television tape which would be as close as we can now get to making a deposition in person.)

6. That evidence is reproducible. It serves the same purpose as other evidence that can be reproduced; it brings to the wider public an appreciation of what happened in the court and of what happened to bring the matter to court.

7. The case before this Court is of grave importance. Each part of it that can be reported fairly is of interest and consequence to the public. Those in the courtroom are privileged to hear evidence as it could never before be heard in previous centuries of court practice. It is easily reproducible for the public at large, the public that cannot attend the daily sittings. That it is more vivid in conveying the sense of what happened—as photographs are more vivid in some cases than is print—is not a reason *against* allowing it to be reproduced, but rather is an argument *for* allowing such reproduction and dissemination.

8. I am, of course, familiar with the rules prohibiting cameras and microphones in the courtroom. The present application does not, it seems to me, tread upon any of the grounds upon which such rules is based. For example, in the present trial the jury has been sequestered; it has already heard the exhibits sought to be broadcast; the exhibits in question do not involve live testimony of witnesses and therefore their broadcast could not conceivably lead to intimidation of witnesses nor contribute, in any sense, to a "circus" atmosphere in the courtroom. Indeed, I believe the broadcast of the exhibits in question could not in any way affect the present proceedings. What it could affect is the degree of public awareness and consciousness of the events about which this trial relates. That is, it seems to me, precisely what broadcast journalism should do, if it is permitted to do so. I most respectfully urge the Court to permit the

broadcast press to have access to and make copies of the tape exhibits for broadcast to the public.

/s/Richard C. Wald

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APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

November 13, 1974

MEMORANDUM TO ALL ACTIVE JUDGES:

RE: U. S. v. John N. Mitchell, et al
Criminal No. 74-110

Attached hereto is an application of National Broadcasting Co., American Broadcasting Co., CBS, Inc. and Radio Television News Directors Association, filed in the above criminal case, requesting that they be permitted to copy the tapes admitted in evidence in the above case and to broadcast same.

Judge Sirica has previously denied such permission but has referred this application to me for action, stating that he does not have the necessary time to give it at the present time.

I deem that this matter presents a serious question of policy that should be determined by the whole Court. I have, therefore, referred the application to Judge Gesell for study and report at an Executive Session of the Court

to be held after Counsel for Defendants have had an opportunity to respond.

/s/George C. Hart, Jr.
Chief Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CRIMINAL CASE NO. 74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION and PUBLIC BROADCASTING SERVICE

APPLICATION OF PUBLIC BROADCASTING SERVICE

Public Broadcasting Service respectfully joins the application of National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS Inc., and Radio Television News Directors Association, filed the

12th day of November, 1974 seeking an order permitting movants to have access to and make copies of tape recordings introduced in evidence and played to the jury in open court, in the above-entitled action, for the purpose of broadcasting said tape recordings to the public.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

CAHILL GORDON & REINDEL
Suite 900
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Washington, D.C. 20006
Attorneys for Movants

Of Counsel:

Public Broadcasting Service
Norman H. Sinel
Vice President and General Counsel
485 L'Enfant Plaza, S.W.
Washington, D.C. 20024

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT OF FRED GRAHAM

FRED GRAHAM, having duly sworn, deposes and says:

1. I am CBS News Legal Correspondent, currently assigned to cover the Watergate cover-up trial, *United States v. Mitchell, et al.*, for CBS News. From 1965 to 1972 I was Supreme Court and legal correspondent for the New York Times.

2. In connection with my work as a journalist, I have been involved with approximately fifty trials, but I find that the Watergate cover-up trial is absolutely unique because of the White House tapes. Through them, the prosecution is presenting a complicated conspiracy case involving the former top leaders of the government, and is playing for the jury recordings of the actual conversations that were part of the alleged conspiracy.

3. If I were covering the trial for the New York Times, I could report it exactly as any other case—by quoting the words spoken on the tape, and by explaining inflections or pauses that seemed crucial to the meaning of what was said.

4. Also, if the crux of the case were visual, physical evidence, rather than statements recorded on audio tapes, I could present it effectively on television. Broadcast journalists are normally permitted to take physical evidence from the courtroom during recesses and photograph it outside, or we are given copies of documents or photographs. Thus, television was able to communicate vividly the evidence in the recent hearings before Judge Sirica on the 18-1/2 minute gap in the White house tape—by filming photographs introduced in evidence of Rose Mary Woods' demonstration of her accident with the recorder, and by filming the scraps of

brown paper used by the Secret Service to keep records of who had the tapes.

5. However, in perhaps the most important trial in this country's history from the standpoint of informing the public, I have found the broadcast media handicapped because of the crucial role of the tapes. As I listen to the tapes in the courtroom, I find that I understand Watergate in a way that I had never understood it before, even though I have reported almost exclusively on Watergate for the past eighteen months. The only way to try to convey this to the public in a broadcast is to attempt to copy the speakers' inflections as I quote them on the air—but this is so difficult and I am so unsure that I can do fairness to them all, that I have virtually abandoned it.

6. At present, would-be spectators are starting to line up outside the courthouse at midnight prior to the days when tapes are to be played. I estimate that about 1,300 of them will get to hear portions of tape during the course of the trial. I have interviewed some of them after listening, and all have said that they understand Watergate in a way they did not before.

7. It is my belief that the only way the Watergate cover-up case can be a truly public trial under these circumstances is for the tapes to be made available for copying, as physical evidence would be, so that it may be broadcast to the public.

/s/FRED GRAHAM

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 74-110

Miscellaneous No. 74-128

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, ET AL.

ORDER

It appearing that an application by certain television and radio broadcasters has been filed in this cause, and the Court having determined that applicants lack standing in this proceeding and that the matter should be treated as filed as a civil miscellaneous matter, now therefore it is

ORDERED that

(1) the application, motion and all supporting papers shall be transferred by the Clerk of Court to a miscellaneous number, without refiling; and

(2) any person served with the application desiring to support or oppose shall so indicate by filing written notice with the Clerk of Court within seven days from the date of this Order, and shall submit with such notice in affidavit form any pertinent supporting information.

/s/John J. Sirica
UNITED STATES DISTRICT JUDGE

November 19th, 1974.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, et al.

AFFIDAVIT OF
JAMES F. DAVEY

JAMES F. DAVEY, being first duly sworn, states as follows:

1. I am the Clerk of the United States District Court for the District of Columbia.

2. This affidavit is submitted in accordance with Judge Gesell's Order dated November 19, 1974, directing that the Clerk of Court: (1) prepare a statement detailing the mechanical procedures followed during the trial of *U. S. v. John N. Mitchell, et al.*, CR 74-110, in reproducing, playing to the jury, and receiving in evidence certain tapes; and (2) indicate any facts bearing on the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved.

3. To obtain information for this statement I consulted Todd Christofferson, Law Clerk of Judge Sirica; James Capitanio, Courtroom Deputy to Judge Sirica; George Frampton, Assistant Special Prosecutor; and Robert L. Halvorson, Professional Engineer (em-

ployed by the Office of the Special Prosecutor as a Consultant).

4. Mr. Christofferson, who has had access to and control over the tapes since they were subpoenaed, advised me that:

> White House tape recordings were submitted to the Court pursuant to two separate subpoenas. The first group of tapes were delivered in November 1973 and the second in July and August 1974. In each instance, the Court received what purported to be the entire reel of original recording on which was found any portion of a subpoenaed conversation.
>
> As the time for trial in *U.S. v. Mitchell, et al.*, CR 74-110, approached, the Court reproduced subpoenaed conversations from the original recordings, using technical assistance supplied by the Watergate Special Prosecutor. Portions of conversations and, in some cases, entire conversations which the Court had previously declared to be subject to privilege were not reproduced. Two copies of each conversation were produced simultaneously and were designated Copy A and Copy B. The Copy B series was delivered to the Special Prosecutor pursuant to the subpoenas aforementioned for use in the preparation of transcripts. Copy A series tapes were retained by the Court and later marked for identification as Government Exhibits in CR 74-110. These tapes are contained on about 50 separate reels.

In the Government's case at trial, some, but not all, of the Copy A series tapes were admitted into evidence. Some, but again not all, of the tape exhibits were published to the jury. Those published were played to the jury either in whole or in part. Where exhibits were not published in their entirety, the deletions had been made either by the Government on its own motion or pursuant to an order of

Judge Sirica. Deletions were effected not by modifying the exhibit itself, but by skipping deleted portions on the tape or by interrupting the sound transmission to the jurors' headphones. The exhibits remain as originally constituted.

The jurors were provided with transcripts of the tape recorded conversations for use as aids in listening to the exhibits. These written transcripts were marked for identification as Government Exhibits, and copies provided to the individual jurors, counsel, and news media representatives at the time the tapes were played. Deletions in the copies of transcripts used by the jurors and others matched precisely the deletions in tapes as they were published at trial.

In many instances the Copy A series tapes introduced as Government Exhibits contain material that has not been published to the jury and others present in the courtroom.

> Reproduction of those portions of tape exhibits played in Court could be made from the exhibits (the appropriate Copy A series tapes). The reproduction process would require playback and copying equipment and someone with sufficient technical expertise to operate such equipment. The process would also require the participation of someone sufficiently familiar with the exhibits to locate and identify published portions and who could be responsible to the Court for assuring that only such portions were copied.

5. Mr. Halvorson advised me that two professional recording machines would be needed to make a copy of the tapes played to the jury. One machine would be used to play back the tape played to the jury; the other machine would be used to make the copy. Two such machines (Ampex AG 600 B), which are on loan to the Office of the Special Prosecutor from the House

Judiciary Committee, are presently available. Mr. Halvorson would assist in reproducing the tapes for his standard consulting fee of $20.00 per hour or $100.00 per day.

6. Aside from possible consulting fees to Mr. Halvorson, the only other expense involved in reproducing the tapes would be the cost of reels of tape that would have to be purchased. Mr. Halvorson advised me that reels of the quality used during the trial cost about $4.00 to $5.00 per reel. Since the tapes introduced in evidence are contained on about 50 separate reels, and since not all such tapes were played to the jury, the maximum cost of the reels would be about $250.00.

7. Insofar as the time involved in reproduction is concerned, the total playing time of the tapes introduced in evidence is about 30 hours. The total playing time of that portion of the tapes actually played to the jury is somewhat less, perhaps 16 to 20 hours. To this time would have to be added the time involved in locating on a given tape that portion actually played to the jury. Thus, my best estimate of the time that would be involved in reproducing those portions of the tapes actually played to the jury is about five to seven days.

8. The reproduction process would involve "matching" the transcript of the tapes played to the jury with the related Copy A series tape. This "matching" process could be accomplished most expeditiously by a team made up of Robert Halvorson and either Todd Christofferson or George Frampton, the Assistant Special Prosecutor most familiar with the tapes. However, since both Mr. Christofferson and Mr. Frampton are devoting their full time to the trial in CR 74-110, I recommend that if the Court determines that the tapes should be reproduced now, then such reproduction be accomplished by Mr. Halvorson and one of my deputy clerks. I could make my Management Assistant, Helene Beale,

available for this purpose. With some initial guidance from Mr. Christofferson, Mrs. Beale could familiarize herself with the tapes and transcripts and could assure the Court that only those portions of the tapes actually played to the jury were copied.

/s/James F. Davey

[Verification Omitted in Printing]

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Crim. No. 74-110

UNITED STATES OF AMERICA

v.

JOHN MITCHELL, et al.,

Defendants

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO APPLICATION OF BROADCASTING COMPANIES

The United States submits this memorandum in response to the motion of National Broadcasting Company, Inc., American Broadcasting Company, Inc., Columbia Broadcasting System, Inc., Radio Television News Directors Association, and Public Broadcasting Service for an order allowing them to make copies for

public broadcast of the tape recordings introduced into evidence in *United States v. Mitchell*, Crim No. 74-110 (D.D.C.).[1]

Although movants' suggestion that they have a constitutional right to duplicate the tape recordings is debatable,[2] the court has the inherent power to permit reproduction of the recordings if it determines that the process is consistent with the sound administration of justice and is in the public interest. As long as the rights of individuals involved are not affected, this determination is peculiarly within the discretion of the Court. The Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of

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[1]NBC, ABC, CBS, and Radio Television News Directors Association filed a written motion and request for a hearing on November 12, 1974. On November 13, PBS sought leave to join in this motion. A supporting affidavit was filed with the original request and another was submitted on November 13. Judge Sirica, the trial judge in the underlying case, who previously had denied permission to duplicate the recordings, referred the application to the Chief Judge.

[2]Contrary to movants' contention, refusal to allow duplication of the tape recordings in the midst of trial is not a classic prior restraint on speech or the press. This is not a case in which the government seeks to forbid the press from publishing information, *cf. New York Times Co. v. United States*, 403 U.S. 713 (1971), or to command the press to publish certain material, *cf. Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974). Rather, it is a "right of access" case. *Cf. e.g., Consumers Union v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18, 25 (D.D.C. 1973). Although commentators have disputed the proposition, *see, e.g., Note, The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505 (1974); *Note, The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838 (1971), the Supreme Court repeatedly has stated that the press has no greater right of access to information than the public, *see, e.g., Pell v. Procuniter*, 94 S. Ct. 2800, 2810 (1974); *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972); *Estes v. Texas*, 381 U.S. 532, 540 (1965).

the United States to a fair trial would be jeopardized if the motion is granted, and accordingly does not oppose the motion.[3]

Respectfully submitted,

/s/HENRY S. RUTH, Jr.
Special Prosecutor

/s/PETER M. KREINDLER,
Counsel to the Special Prosecutor

/s/JAMES F. NEAL,
Associate Special Prosecutor

/s/DAVID KAYE,
Assistant Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N.W.
Washington, D.C. 20005

Attorneys for the United States

DATED: November 26, 1974

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[3]Of course, if the motion is granted, there must be procedures to insure that the duplication process does not interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced into evidence. Because more than one copy of the recordings already exists, this should be no problem.

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APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

Plaintiff,

v.

JOHN MITCHELL, et al.,

Defendants.

OPPOSITION OF RICHARD NIXON TO APPLICATION OF NBC, ET AL, FOR COPIES OF PRESIDENTIAL RECORDINGS

Richard Nixon, through his undersigned attorneys, hereby opposes the application of the National Broadcasting Co., Inc., et al., for copies of the presidential tape recordings introduced in evidence in the case of *United States v. Mitchell, et al.*, Crim. No. 74-110, in order to play those tapes on radio and television. This opposition is submitted pursuant to the Order of the Hon. John J. Sirica, District Judge, dated November 19, 1974, permitting opposition by "any person served with the application" within seven days of that date.

Mr. Nixon has an interest in this proceeding in that the tapes sought by applicants were obtained by subpoena from him personally; they have been held by the Supreme Court to be subject to a privilege of confidentiality, asserted by Mr. Nixon, which was overcome in this case only to the extent the tapes were shown to be essential to enforcement of the criminal laws; and Mr.

Nixon's voice appears on each of the tapes, in the course of private conversations with his aides. Mr. Nixon's personal interest has nothing to do with any possible effect of the broadcast of the tapes upon the pending criminal trial before Judge Sirica, and no such questions are discussed here. The basis for this opposition is that broadcast of the tapes by the applicants will have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others whose voices appear on the tapes in candid conversations never intended to be publicly aired, and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein, often in the kind of blunt and offhand remarks common in private conversations among close associates but which do not necessarily represent considered judgments and which would not be made publicly. These effects will be far more severe than any that have occurred thus far, and are totally unnecessary to and unjustified by the purpose for which production of these recordings was initially compelled by this Court.

I.

THE RELIEF REQUESTED BY THE APPLICANTS WOULD FURTHER INTRUDE ON THE PUBLIC AND PRIVATE INTERESTS IN THE CONFIDENTIALITY OF THE RECORDINGS.

Each of the recordings involved in the application were initially subpoenaed by the Special Prosecutor for use in grand jury proceedings or criminal trials, and were the subject of claims by Mr. Nixon of presidential privilege. The privilege was held applicable by every court that considered the matter, but was held to be overcome by, in the language of the Supreme Court, a "demonstrated,

specific need for evidence in a pending criminal trial." *United States v. Nixon*, __ U.S. __, 94 S.Ct. 3090, 3110 (1974). In their opinions, however, both the Supreme Court and the Court of Appeals emphasized the injury likely to occur by any inroad on the confidentiality of the privilege, and the necessity of limiting the intrusion to the minimum necessary to fulfill the compelling purpose for which the privilege was held to yield. Furthermore, the Supreme Court noted that the *privacy* of those whose voices appeared on the tapes was one consideration underlying the privilege. The Court stated, 94 S.Ct. at 3107 (emphasis added):

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference *for the privacy of all citizens* and added to those values *the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decisionmaking.* A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions *and to do so in a way many would be unwilling to express except privately.* These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

The Court of Appeals in *Senate Select Committee v. Nixon*, __ U.S. App. D.C. __, 498 F.2d 725, 729-730 (1974), stated much the same reasoning:

> [P]rotection of the presidential decisionmaking process requires a promise that, as a general matter, its confidentiality would not be invaded, even to the limited extent of a judicial weighing in every case of a claimed necessity for confidentiality against countervailing public interests of the moment.

Obviously, the conversations that were confidential at the time the privilege was asserted are no longer confidential insofar as they have been played publicly during the Watergate criminal trial and excerpts thereof printed and broadcast by news media. That does not mean, however, that all the interests in privacy recognized by the Supreme Court and the Court of Appeals have disappeared. Indeed, any such contention by the applicants in this case would directly contradict the very basis upon which they rest their claim. For if no further exposure of the conversations is involved beyond what has already occurred, then concomitantly no further purpose of "informing the public" can be asserted.

There is no need, we trust, to review here the nature of the conversations on the tapes. Wholly putting aside the substance of the conversations as they relate to the Watergate affair, they contain exactly the kind of blunt, candid, and even profane remarks that one might expect in a recording of a conversation among close associates none of whom contemplated public airing of his words: Some of the remarks are embarrassing to other individuals—even to heads of foreign states[1]—and some reflect opinions perhaps not well-considered by the speaker, but as to which he will not have any opportunity for correction or explanation remotely approaching the kind of exposure given to the tapes.

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[1]Interestingly, the Supreme Court anticipated this very problem and was careful to emphasize the sensitivity of the material in this regard. *United States v. Nixon, supra*, 94 S.Ct. at 3111: "The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment."

Our point here is not that the injury that will plainly occur to the participants and other persons mentioned in the conversations, as well as to the public interest to the extent that remarks offend others whose goodwill is essential to the welfare of this nation, would be sufficient to authorize an injunction by a court against reporting of such conversations, by broadcast media or otherwise, as they are played in the courtroom for the purpose of the Watergate criminal trial. That, however, is not the issue here. Our point is simply that the broadcast of the tapes *will invade* the interests of Mr. Nixon and others, and thus cannot be permitted when, as here, the applicants have shown no *right* to the relief they seek.

II.

THE TAPES ARE IN THE CUSTODY OF THIS COURT UNDER SUBPOENA FOR THE PURPOSE OF A CRIMINAL TRIAL AND FOR NO OTHER PURPOSE.

That the recordings are in the custody of this Court not for the purpose of "informing the public," but solely and exclusively for the purpose of determining the guilt or innocence of defendants in a criminal trial now being conducted before a jury, seems too plain to require discussion. The Supreme Court in *United States v. Nixon, supra,* repeatedly emphasized that the sole consideration justifying an order against the President to produce the presumptively privileged materials was "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions . . ." 94 S.Ct., at 3107. See also *id.* at 3109. The Court added that in determining whether particular materials should be produced, it is incumbent on the Court to "afford presidential confidentiality *the greatest protection consistent with the fair administration of justice.*" *Id.* at 3111 (emphasis added).

Though the applicants rely in part on the Sixth Amendment guarantee of a "public trial" as purported grounds for their application, there is and can be no real suggestion that broadcast of the tape recordings is necessary to the "fair administration of criminal justice." Indeed, Mr. Wald, in his affidavit attached to the application, states that "broadcast of the exhibits in question could not in any way affect the present proceedings." The sole purpose of the application is said to be to enable the applicants to "provide news coverage of this extremely significant trial in the manner which best fits the distinctive abilities of broadcast journalism." (Memorandum of Points and Authorities in Support of the Application, p. 1.) That provides a *reason for making* the application; but it provides no *authority* for the relief requested. The relief is totally unrelated to the sole purpose for which the tapes were ordered produced. To establish a right to broadcast the tapes, the applicants cannot rely on the fact that they have been disclosed for the purpose of a criminal trial. Where the privacy of individuals is involved, the courts have no more power than does Congress to "expose for the sake of exposure." *Watkins v. United States,* 354 U.S. 178, 200 (1957); see also *Hentoff v. Ichord,* 318 F.Supp. 1175, 1181 (1970). The applicants must show some independent legal basis for the relief they seek. This they have failed to do.

III.

APPLICANTS HAVE NO CONSTITUTIONAL RIGHT TO COPY AND BROADCAST THE TAPES.

The fallacy of applicants' constitutional argument is illustrated by their starting proposition: that there exists a "ban" on broadcasting which constitutes a "prior restraint" on freedom of the press. There is no such ban. The applicants' inability to broadcast the tapes is not due to any restraint imposed by the Court or by law on what

is published or how it is disseminated, and the trial is as fully public as a trial can be. The applicants' problem is their lack of the tapes themselves or copies thereof. That lack—which is shared by the applicants with everyone else except the Court, which has them because of the necessity held by the Supreme Court to be a basis for their production—no more constitutes a prior restraint on the press than does their lack of any other materials in the possession of any branch of the government which the applicants might be interested in broadcasting.

According to the argument of the applicants, any restriction on *access* to material which they wish to use for news purposes would amount to a prior restraint on their freedom bearing a "heavy presumption of unconstitutionality." That theory has recently been squarely rejected by the Supreme Court. In *Pell v. Procunier*, __ U.S. __, 94 S.Ct. 2800, 2810 (1974), the Court held that newsmen have no right of access under the First Amendment to "information not available to the public generally." The Court stated, *id.*"

> It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. Branzburg v. Hayes, *supra*, and that government cannot restrain the publication of news emanating from such sources. Cf. New York Times v. United States, *supra*. It is quite another thing to suggest that the Constitution imposes on government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

See also *Saxbe v. Washington Post Co.*, __ U.S. __, 94 S.Ct. 2811, 2815 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684-685 (1972).

The applicants have every right of access to the tapes which is afforded the public generally. Indeed, they, along with members of the print media, have been afforded special privileges by the Court to enable them most effectively to cover the Watergate trial. What they seek is not the lifting of any restriction on their activities, but an additional special privilege not granted to members of the public: their own copies of the tapes. It is only by refusing to acknowledge this distinction that the applicants are able to cite in their argument the wealth of cases which properly have struck down injunctions, orders and other forms of restraints on the conduct of the press in its coverage of criminal trials which were not supported by compelling interests of fairness in the administration of justice.[2] Each and every one of those cases involved an affirmative restriction on the activities of the press, rather than a claim by members of the press of entitlement to a special privilege; and each, therefore, is inapplicable to the present case.

Finally, the contention that the Sixth Amendment's guarantee of a public trial affords to the applicants a constitutional right to copies of the tape recordings is wholly untenable. The applicants concede, as they must, that the Court has not "in any sense, conducted this trial in a secret or closed manner." (Memorandum of the

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[2]*E.g.*, *Craig v. Harney*, 331 U.S. 367 (1947) (newsmen may not be convicted of criminal contempt for editorials critical of trial judge's handling of case); *United States v. CBS*, 497 F.2d 102 (5th Cir. 1974) (vacating order of trial court prohibiting courtroom sketching or publication of sketches); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (holding unconstitutional a court order barring newsmen from reporting details of evidence at hearing); *Times-Picayune Publishing Corp. v. Schulingkamp*, 43 U.S.L.W. 2046 (U.S.Sup.Ct. July 29, 1974) (stay granted of order prohibiting reporting of testimony at pre-trial hearing until after jury selection).

Applicants, p. 11.) Indeed, it is no overstatement to say that this trial has been more intensively and thoroughly covered by every news medium than any other trial in the nation's history, including the printing of entire tape transcripts and the broadcast, together with televised transcripts, of the portions deemed most newsworthy by the applicants and others.

The airing of copies of the tapes themselves, while no doubt providing a novel and intriguing experience to some listeners and views—along with a painful experience for some whose voices appear or who are mentioned in the conversations—is hardly necessary to fulfill the purposes of the Sixth Amendment guarantee, any more than it is necessary to have a representative of the press present at bench conferences. The public is entitled to "be informed about criminal prosecutions," *United States ex rel. Mayberry v. Yeager,* 321 F.Supp. 199, 204 (D.N.J. 1971), just as it is entitled to know about conditions in state and federal prisons. Cf. *Pell v. Procunier, supra,* 94 S.Ct. at 2802. But the press is not thereby entitled to privileges deemed by it to be useful in covering the trial "in the manner which is most appropriate for its medium." (Memorandum of the Applicants, pp. 2-3.) We submit that the Sixth Amendment, like the First, provides no authority for the relief requested by the applicants, and in view of the injury to others that such relief would entail, the application must be denied.

Respectfully submitted,

/s/Herbert J. Miller, Jr.

/s/Raymond G. Larroca

/s/William H. Jeffress, Jr.

/s/R. Stan Mortenson

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Attorneys for Richard Nixon

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APPENDIX K

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et. al.,

Defendants.

Criminal Case No. 74-110

IN RE WARNER COMMUNICATIONS, INC.

APPLICATION OF WARNER COMMUNICATIONS, INC. FOR PERMISSION TO COPY TAPE RECORDINGS IN EVIDENCE

Warner Communications, Inc., by undersigned counsel, hereby respectfully moves this Court, pursuant to Rule 47 of the Federal Rules of Criminal Procedure, for an Order permitting it and its wholly owned subsidiaries to

have access to and copy those tape recordings introduced into evidence and played to the jury in open court in the above-captioned case, for the purpose of disseminating those tape recordings to the public by means of phonograph and tape recordings.

This application is made pursuant to the First and Sixth Amendments to the Constitution of the United States and, alternatively, on non-constitutional grounds. The reasons in support of the application are set forth in the accompanying Memorandum of Points and Authorities in Support of Application of Warner Communications, Inc. for Permission to Copy Tape Recordings in Evidence.

Respectfully submitted,

/s/Joseph A. Califano, Jr.

/s/Richard M. Cooper

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D. C. 20006
(202) 331-5000

/s/Sidney Rosdeitcher

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York

[Caption Omitted in Printing]

AFFIDAVIT OF FRED W. FRIENDLY

FRED W. FRIENDLY, being sworn, states:

1. I am Edward R. Murrow Professor of Broadcast Journalism at the School of Journalism, Columbia University. I am also an adviser on television to the Ford Foundation. I was associated with the radio and television industry from 1938 to 1966. I have had considerable experience with the use of audio and visual means for recording historic events. From 1964 to 1966 I was President of CBS News; prior to that I had been executive producer of the documentary news program, CBS Reports. I collaborated with Edward R. Murrow in an aural history of the period 1932-1950, recorded under the title *I Can Hear It Now*, and I collaborated with Walter Cronkite in the production of a similar recording for the 1960s entitled *I Can Hear It Now-The Sixties.* Mr. Murrow and I also produced an aural autobiography of Winston Churchill.

2. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public.

3. I believe that recordings of the type which WCI proposes to make and disseminate will result in a unique contribution to public understanding of the momentous events generally referred to as Watergate. An aural record of the taped conversations heard by the jury in this case is far superior to the printed record of those conversations which has already been made available through newspapers and television. The cold printed record of

those conversations cannot possibly convey the true and full story they tell. That story can only truly be known by hearing the words spoken by the participants themselves—and hearing their inflections and their tones of voice, and the equally significant interjections of pauses and silences.

4. As a participant in the creation of aural history I believe I can attest to the importance to public understanding and to history of an aural record of certain events such as those now before the jury in this case. Surely, for example, the real truth about the confrontation between Chambers and Hiss, or about the Army-McCarthy hearings, and the famous exchange between Senator McCarthy and Joseph Welch, or about the historic Senate Foreign Relations Committee Hearings on the Vietnam War, could not fully be known and evaluated by the public or by history without actually hearing the recorded words of the participants. Certainly the public and future historians would be greatly deprived of an opportunity to learn the true facts about Watergate if the White House conversations—already recorded in print and heard in open court—were not readily accessible through an aural record such as the one WCI proposes to make.

5. The broadcast dissemination of the conversations played to the jury will undoubtedly be a major contribution to the education and enlightenment of the American public. But as a teacher of journalism, as one who has spent all of his professional life as a broadcast journalist and as a participant in other projects for recording aural history, I can state that phonograph and tape recordings of those conversations for dissemination to the public for use in their homes, in their schools and in their libraries will be an even greater contribution to public understanding of these events. Broadcast dissemination will give the public an immediate but somewhat transient exposure to the truth about these events which have so affected our nation for the last two years. Phonograph recordings and tapes will permit the public and scholars to ponder these events in the deliberate manner that they deserve and to contemplate their significance for our society and our political system. They will provide a more lasting and more widely accessible record for this and future generations.

6. This affidavit has been submitted in response to an invitation by WCI and it is my judgment that the public interest for fully understanding these events will best be served by granting WCI's application and permitting them to disseminate phonograph recordings and tapes of the conversations which the jury—as well as spectators and the working press—have already heard. But I should also like to express my concern over the long-term implications of this matter for the public and particularly for journalists and historians of future generations. They will return to this recorded history with a perspective different from ours. They will require access to the unabridged, unedited tapes of the conversations played to the jury. I would urge that necessary steps be taken now to insure that archives at universities and other libraries will have the opportunity to incorporate all of this material in their permanent collections.

/s/Fred W. Friendly

[Verification Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT OF DAVID H. HOROWITZ

DAVID H. HOROWITZ, being sworn, states:

1. I am Executive Vice President of Warner Communications Inc. ("WCI"). I am the principal officer of WCI responsible for overseeing on a corporate level the operations of those subsidiaries of WCI in the phonograph record and tape business. Before holding this position, I was for ten years Vice President and General Counsel of Columbia Pictures Inc. In these capacities and prior to that as an attorney, I have had broad experience in the motion picture, record and cable television industries. I make this affidavit in support of the application by WCI for access to and the right to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial. WCI seeks such access so that it may make phonograph and tape recordings of those tapes for dissemination to the public.

2. Warner is a diversified company principally engaged in the communications business. It is a leading manufacturer of phonograph records and tapes through its subsidiaries Warner Bros. Records Inc. ("Warner Records") and Atlantic Recording Corporation ("Atlantic"), and its Elektra/Asylum/Nonesuch Division ("Elektra"). Through a network of branch distribution offices throughout the United States and in many foreign countries, WCI subsidiaries distribute these records and tapes all over the world. Through other subsidiaries, WCI is also a major producer and distributor of motion pictures and television programs (Warner Bros.); a leading operator of cable television systems throughout the United States (Warner Cable Corp.); a publisher of paperback books (Warner Paperback Library); and a distributor of magazines and periodicals (Independent News Company).

3. The proposal of the broadcast media to afford the American public the same access to the tapes already available to those who attended the trials is a commendable one. WCI makes this separate application because we believe that through the media of phonograph records and tapes we can provide the American public with an even better means for fully understanding these historic events. The broadcast media can give to the public immediate and contemporary knowledge of these events, but only phonograph records and tapes can fix the record of these events in an enduring fashion which can be deliberately contemplated, studied, and reviewed by this and future generations of Americans in their homes, schools and libraries.

4. The newspaper and publishing industry has already begun to perform this task through the media of print. Bantam and Dell have published the stenographic record of the tapes released by the White House. Newspapers have already printed large portions of the stenographic record of the tapes played to the jury in this case, and the publishing industry is free to, and undoubtedly will, publish in book form the full stenographic record of the tapes. But it is now commonly accepted that the true significance of the words spoken on the tapes can only be grasped by hearing the tones and inflections of the speakers and the pauses and silences which, no less than the words themselves, convey the true meaning of the speakers. Surely, if the general public is allowed access to the conversations through the media of the printed word, it is even more important the public have access to the fuller, more accurate record which captures the added, indeed critical, dimension of the actual sound of the conversations.

5. The affidavits of the Clerk of the Court shows that the copying of the tapes for the networks can be

accomplished with full protection for the physical safety of the tapes themselves, with little burden to the Clerk's office, and with no intrusion or disruption of the Court proceedings. Granting WCI's application would involve no additional burden or disruption. We would propose that the copies we seek be made at the very same time and by the same procedures as the copies being made for the networks. This could easily be done, for example, by arranging for WCI to share with the networks the cost of making a single master tape of those portions of the tapes heard by the jury. Additional copies could then be made for the different applicants from this master tape.

6. WCI believes that the conversations heard by the jury and the public in open court should receive the widest possible dissemination to the American public in a form which most faithfully preserves their accuracy for future understanding. Accordingly, we respectfully request that the Court grant WCI's application.

/s/David H. Horowitz

[Verification and Certificate of Service Omitted in Printing]

APPENDIX L

Memorandum and Order of Judge Gesell, dated December 5, 1974

(located at 36a-43a of Petition for Certiorari)

APPENDIX M

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN D. MITCHELL, ET AL.

IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS, INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; PUBLIC BROADCASTING SERVICE; and WARNER COMMUNICATIONS, INC.

MEMORANDUM OF APPLICANTS, NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS, INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, PUBLIC BROADCASTING SERVICE, AND WARNER COMMUNICATIONS, INC., ON IMPLEMENTATION OF THE COURT'S MEMORANDUM AND ORDER OF DECEMBER 5, 1974

This memorandum is submitted on behalf of all of the applicants before the Court in response to the Court's Memorandum and Order of December 5, 1974 calling for suggestions concerning dissemination of the tapes in evidence in accordance with the considerations set forth therein. Our proposal is in two parts: the first concerns the making of a single master set of reels to be used for further copying; the second concerns the making of copies from the master set.

We suggest that the Court appoint a deputy clerk or some other person to carry out the administrative tasks necessary for the implementation of the Memoerandum and Order of December 5 and consistent with the procedure set forth herein.

Our basic conclusion is that there are no obstacles, technical or otherwise, to the reproduction of the tapes and their public dissemination.

I. MAKING THE MASTER SET OF REELS

Our suggestions for the preparation of the master set of reels are based upon the submissions set forth in the Affidavit of James F. Davey, Clerk of the Court, previously filed in this case. It is our firm understanding that, from an engineering or technical perspective, the process of making a master set of reels is a simple one.

The master set of reels may be made by dubbing (copying) either the Court's copy of the tapes (Copy A) or the Special Prosecutor's copy (Copy B). Mr. Davey has suggested that Copy A be used, and we support the suggestion. However, if Copy B is also available, it would be an entirely satisfactory alternative.

We propose that the technical expert in charge of the dubbing be David Kaye and his associates, who made the original copies (A and B) of the White House tapes. We have confirmed that Mr. Kaye will be generally available whenever called upon. Mr. Kaye is associated with BBN Engineering, 50 Moulton Street, Cambridge, Massachusetts (617-491-1850). BBN is a firm headed by Dr. Richard Bolt, who served on Judge Sirica's Advisory Committee on White House tapes. We suggest that BBN be authorized to make a true and accurate master copy of the tapes.

We join Mr. Davey's suggestion that the engineer work together with someone whose function is to protect the Court's interest in ensuring that only portions played to the jury are copied onto the master reels.

The dubbing should be carried out with broadcast-type equipment. Many adequate brands are available. However, Mr. Kaye has readily available portable Nagra #3B or 4L machines and incidental equipment, which he used to make Copies A and B; and, accordingly, we suggest that those machines be used. We are advised that the master reels should be a series of 30-minute seven-inch reels played at a speed of 7.5 inches per second (IPS), monaural, and using standard NAB equalization. We propose the speed of 7.5 IPS because tapes of speech are normally played by the broadcast media at that speed. The tapes were played to the jury at a speed of 3.75 IPS. However, during the dubbing, the machine playing the original could be run at 3.75 IPS, and the copying machine could be run at 7.5. The difference in speed would not present any risk to the original tapes.

We have no entirely reliable figure for the number of reels needed for the master set. Our best estimate is that approximately 40 will be required (based on an estimated playing time of 18-22 hours).

We suggest that the transfer be carried out in a room in the courthouse, possibly the room used in making Copies A and B. We are advised that it should take less than one week. The present applicants are prepared to bear (and share among themselves) all costs of making the master set of reels, including consulting fees, rental of equipment, purchase of tapes and reels, etc.

We have two additional suggestions which we believe would contribute significantly to the integrity, accuracy, comprehensibility, and historical value of the copies. First, the segments of conversations should be copied in

chronological order rather than in the order in which they were played to the jury. This proposal will not complicate or delay the dubbing process. Second, a microphone should be placed in the circuit to enable the engineer to slate (announce) on the master reels the identification of each segment of conversation—by reference to either the date, time, location and participants, or to the transcript page and paragraph numbers, or to both.

II. MAKING COPIES FROM THE MASTER SET

The master set should be hand delivered, under court supervision, to the firm or agency that will carry out the duplicating to individual orders.

We suggest that one of the many reputable private firms experienced in the duplication of tapes be authorized by someone acting on behalf of the Court to carry out that function. There are several such firms which have a sufficient number of machines (called in the trade "slaves"*) to carry out multiple duplicating at a rapid rate and for a reasonable price. We are prepared to furnish to someone appointed by the Court suggestions as to specific firms that could carry out this function. The ultimate choice should be governed by five criteria: that the firm be reputable, that it be experienced, that it have adequate capacity (a minimum of ten "slaves", though the more the better), that it not be associated with any firm that produces or distributes tapes or records for sale to the public, and that it charge a reasonable rate (the lower the better).

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*The "master" is the machine that plays the original tape from which copies are being made. The "slaves" play the blank tapes that become copies. For purposes of this type of duplication, both master and slaves are run at a faster rate of reproduction.

Alternatively, we suggest that someone acting on behalf of the Court contact government agencies having the technical capability for multiple reproduction of the tapes. Our information is that the United States Information Agency and the United States Marine Corps each have the capability.

Assuming a tape playing time of approximately 20 hours, we estimate that each ten "slaves" working an eight hour day could produce duplicate sets of tapes at the rate of 15 per day. We are advised that the price per reel would likely range between $2.20 and $4.00, depending on the total number ordered by all purchasers. As the number ordered increases, the price per reel would approach approximately $2.20, probably somewhere beyond 1000 sets. Handling and mailing charges would be additional. Since we cannot predict how many sets will be ordered, it may be necessary to assume a distribution of, say, 100, and quote a price on that basis with a clear indication that there may be a refund, depending on the total number of sets ordered.

We propose that upon completion of the master set of reels a public notice describing the copying process be distributed to the press. It is fair to assume that press reports will provide more than adequate publicity to potential purchasers. In addition, if the General Services Administration, the Department of Justice or some other agency is prepared to do so, a notice might be inserted in the Federal Register over its name. The notice should include the name and address of the firm or agency making copies (as the place to which orders should be sent), the total price per set (with an indication of possible refund, depending on the number of sets ordered), a direction that all orders be accompanied by check or money order (including a stated amount for handling and mailing if the set is not to be picked up

personally), a description of the distribution schedule, a specific deadline for mailing purchase orders, and a specific deadline for participating in the initial distribution.

The distribution process should satisfy two overriding interests, both of which have a constitutional dimension. The first is that the tapes be disseminated to the public promptly. Each day of delay postpones the informing of the public by the most effective means available. The second interest is that all persons who desire to purchase sets of the tapes have a reasonable and equal opportunity to do so. In order to accommodate both interests, we propose a two-stage distribution process. The first stage should last five (or, perhaps, ten) days, and end with an initial distribution of tapes to all those who have placed orders during that period. We anticipate that the purchasers during that period will include, but not be limited to, the major media of communications, who will thus be able to make an early dissemination of the tapes to the entire public. After the initial distribution to the earliest applicants on the same day (and thus on a fair and equal basis), orders should continue to be taken for a reasonable period—say, six weeks or three months (or for an additional period if demand warrants). Distributions during this second stage could be made at stated intervals, or on a first-come-first-served basis, or on some other equitable basis. This second stage would provide an adequate opportunity for all persons interested in purchasing sets of the tapes at a low price to do so.

The firm or agency would prepare and package the requisite number of copies and make them available to all purchasers (to be picked up or mailed out), and the initial recipients would all receive their copies on the same day.

During the process of making copies, the duplicating engineer would hear only the first few seconds of each

master reel to assure that there is a signal available, and since the transfer to the blank tapes would take place at high speed he would hear nothing further that would be recognizable.

Upon completion of the copying, the master set of reels should be returned to the Court, for donation to the Library of Congress or the National Archives, or such other disposition as the Court finds appropriate.

CONCLUSION

In this Court's Memorandum and Order of December 5, 1974, it invited suggestions as to the appropriate method for facilitating the release of the tapes in a manner consistent with the considerations set forth therein. We believe that the suggestions set forth herein are consistent with the Court's guidelines, and that they should be embodied in an Order, a copy of which is attached, which will permit both prompt and wide dissemination of the tapes to the public without priority or unfair advantage to anyone.

Respectfully submitted,

/s/Floyd Abrams

/s/Donald J. Mulvihill

/s/Eugene R. Scheiman

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APPENDIX N

Order of Judge Gesell,
dated January 8, 1975

(located at 44a-45a of
Petition for Certiorari)

APPENDIX O

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF WILLA K. BAUM

STATE OF CALIFORNIA)
: ss.:
CITY OF BERKELY)

WILLA K. BAUM, being first duly sworn, deposes and says as follows:

1. I am department head of the Regional Oral History Office, a department of The Bancroft Library of the University of California at Berkeley. The Bancroft Library is a historical manuscript library specializing in documentation of western America. The Regional Oral History Office is one of the earliest oral history offices in the United States, having been established in 1954. The office tape records and prepares transcripts of interviews with persons who have contributed significantly to the development of the West and the nation. Approximately 40,000 pages of transcript have been completed and made available for scholarly research in the Bancroft Library, and one or more transcripts have been deposited in 160 manuscript libraries throughout the world.

2. I have been employed by the oral history office since its founding in 1954. Previous to that I studied American history and graduated from Whittier College, B.A. 1947; Mills College, M.A. 1950; and did further graduate work at the University of California, Berkeley in California history.

3. I have been actively engaged in the development of techniques and ethics of oral history since 1954. I was a member of the small group of oral history practitioners who met at Lake Arrowhead, California in 1966 to discuss formation of a national oral history association, and I was elected to the first council of the newly formed Oral History Association in 1967. I have written numerous articles on oral history, have participated in oral history training workshops, in Oral History Association Colloquia, and am the author of the widely-used *Oral History for the Local Historical Society* (1969, 1970, 1971, The American Association for State and Local History).

4. This affidavit is based on my own experience and belief in the values and proper techniques of oral history.

I do not speak as a representative of the University of California at Berkeley.

5. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during this trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public. I am particularly concerned that those tape recordings be made available to historical manuscript libraries for permanent preservation and use by scholars.

6. I would like to attest to the value for scholarly research of the actual sound recordings of historical events or accounts of historical events. Even though verbatim transcripts have been made of these recordings (and it is not possible in most cases to make a transcript that all hearers will agree is exactly verbatim), the sound recordings still contain evidences of feeling, emphasis, uncertainty or certainty that will be helpful to scholars in many fields in evaluating the significance of the statements.

7. In the case of the Nixon-White House tapes, it is clear from the variant wordings of the transcripts of some of the recordings, and in the number of ambiguous sounds that have been transcribed more-or-less phonetically, that any clear understanding of what took place requires access to the tape recordings themselves. It therefore seems important that the sound recordings be made available to the public under the same conditions as the transcripts.

8. This affidavit has been submitted in response to an invitation by WCI. I wish to add my recommendation to that of other oral historians and scholars that WCI be permitted to make the Nixon-White House tapes, of which the transcripts are already available, available to

the public. In particular, that steps be taken to preserve and open these materials for scholarly research.

/s/Willa K. Baum

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 74-110

UNITED STATES OF AMERICA,

Plaintiff,

- against -

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT

State of California)
: ss.:
County of Los Angeles)

FAWN M. BRODIE, being sworn, states:

1. I am Fawn M. Brodie, Professor of History at the University of California at Los Angeles. I am an historian and biographer, the author of four biographies, the most

recent of which are *The Devil Drives, a Life of Sir Richard* F. Burton (Norton, 1967), and *Thomas Jefferson, an Intimate History* (Norton, 1974). I have been teaching history at U.C.L.A. since 1967, my special field being the history of the American presidency.

2. I make this affidavit in support of the application by Warner Communications Inc. ("WCI") to copy certain tape recordings introduced in evidence and played to the jury in open court during the Water-gate coverup trial, for the purpose of making phonograph and tape recordings of those tapes for dissemination to the public.

3. The special value of the spoken word for training in history has been increasingly recognized in recent years. Oral history collections are now routinely used in universities all over the nation, and these collections are constantly being augmented. The use of tapes in history classes promises to become common as tapes and records become more generally available.

4. Professors of history at U.C.L.A. frequently use films to give a more vivid sense of the reality of the past. We encourage students to watch great documentary films like the B.B.C.-produced "The World at War," which has been available to public television in the United States for the past two years. The deep-throated voice of Churchill, with the faintest trace of a stammer, making his memorable speech about "blood, sweat, and tears," if listened to even without the visual image of the bulldog thrust of the jaw, conveys the strength and courage of this great leader almost as much as the words themselves. The hatred and contempt he felt for the Nazis is communicated in his very pronunciation of the word "nazis." There is no way of describing this contempt and hatred to students quite so effectively as by allowing them to hear the words from his own lips.

5. Similarly, the fireside chats of Franklin Roosevelt convey a jauntiness of temperament, an elevation of spirit, a sense of hope and optimism, that is partly lost if one reads these speeches rather than listening to them.

6. For students trying to understand the psychopathology of Adolf Hitler, it is absolutely essential that they hear the strident screaming of his speeches.

7. In my own writing of men in the past, particularly Thomas Jefferson, I wished many times that I had available a tape of one of his committee meetings, where his genius is said to have had special impact, or a tape of his first great inaugural address, said to have been delivered in such a low voice that it was heard by only the listeners in the first rows of the audience. We know of his magical gift for friendship only from the letters and memoirs of his friends.

8. As far as the tapes of Richard Nixon are concerned, I believe most profoundly that these should be made available to the American people. Members of Congress have already been permitted to hear many of them, and to judge for themselves exactly what was said during a conversation, when there was controversy over specific words. A nuance of expression, when listened to, can convey exactly whether words are spoken seriously, ironically, or in jest. In the case of the Nixon tapes, where there is so much controversy over specific words, it is imperative that historians and students be allowed to listen to the tapes over and again, so as to catch the inflections of voice which are essential to end the controversies arising out of the printed versions. In certain important instances, only repeated hearings can clarify exactly not only what was said, but also the spirit

in which it was said. By having access to these tapes the historian can be more faithful to the truth.

/s/Fawn M. Brodie

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS, INC.

AFFIDAVIT OF JAMES MACGREGOR BURNS

STATE OF MASSACHUSETTS)
: ss.:
COUNTY OF BERKSHIRE)

JAMES MACGREGOR BURNS, being first duly sworn, deposes and says:

1. I am Woodrow Wilson Professor of Government at Williams College, where I have been a member of the

Political Science Department since 1941. I am also President-Elect of the American Political Science Association. My principal field of scholarly interest is political leadership. I am the author of numerous articles and the following books: CONGRESS ON TRIAL (1949); GOVERNMENT BY THE PEOPLE (with Jack W. Peltason) (1951-1971); ROOSEVELT: THE LION AND THE FOX (1956); JOHN KENNEDY: A POLITICAL PROFILE (1960); THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA (1963); PRESIDENTIAL GOVERNMENT: THE CRUCIBLE OF LEADERSHIP (1966); ROOSEVELT: THE SOLDIER OF FREEDOM (1970); UNCOMMON SENSE (1972). My 1970 book on Franklin Roosevelt was awarded the Pulitzer Prize, the National Book Award, and the Francis Parkman Prize for 1971.

2. During World War II, I served in the Pacific as a combat historian, and took part in the invasion of Saipan, Guam and Okinawa. I have served as a staff member of the Hoover Commission, and with other government agencies and committees.

3. During the course of my scholarly research, I have used oral source materials on a number of projects, including my biographies of Franklin Roosevelt and John F. Kennedy.

a. In preparing my biography of Franklin Roosevelt, I found it especially useful to listen to recordings even when I had accurate transcripts. For example, one cannot comprehend the gravity of the situation on March 4, 1933, I believe, unless one hears FDR's solemn and at times rather tense-sounding voice. Nor can one appreciate the intensity of the 1936 election without hearing Roosevelt give his famous speech in Madison Square Garden, where he said he welcomed the hatred of big business and others who opposed him.

b. Similarly, John Kennedy's way of speaking added interest and importance to the substance of his words. In interviews I conducted with him, he communicated much through the tone and inflection of his voice. I particularly recall the derogatory way in which he referred to his service in the House of Representatives and the Senate.

4. The utility of oral source materials to historians, biographers, political scientists and other scholars is attested to by the growing number of oral history libraries which have been established, many of which include actual recordings as well as transcripts. Scholars use oral source materials for historical authenticity—to clarify questionable phrases, to check on the accuracy of transcripts, and for other reasons.

5. The White House tapes played to the jury in *United States v. Mitchell* will be of particular importance to historians and biographers because of the peculiar nature of the conversations recorded. It will be recalled that when transcripts of these conversations were released, the conversations seemed somewhat disorganized, fragmented, discursive, jumbled. But it is well known that intelligible conversations may look unintelligible when reduced to formal transcript sequence. I believe that persons listening to the actual conversations would find them far more meaningful than would be possible just from perusing the transcripts. The recordings can capture the interplay of several personalities through means that cannot be made to appear on paper—timing, interruptions, simultaneous comments, communication of emotion through tone of voice, the emotional quality of responses.

6. Finally, there is the question of public confidence in the tapes. There has been considerable suspicion that the tapes have been tampered with, and that the transcripts are inaccurate. Making the recordings available

should help restore faith that at least on this score the government did a faithful job of transcribing. And it would be a healthy thing if government officials in the future—including stenographers—realized that members of the general public might have the right to check transcripts against recordings.

Further deponent sayeth not.

/s/James MacGregor Burns

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No.
74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF MAURICE A. CRANE

STATE OF MICHIGAN)
: ss.:
CITY OF EAST LANSING)

MAURICE A. CRANE, being first duly sworn, deposes and says as follows:

1. I am presently Director of Voice Library at the Michigan State University in East Lansing, Michigan. I am a social historian, a longtime professor of Humanities, and have an abiding interest in collecting oral sources for historians. I have a Ph.D. in English (Illinois, 1953).

2. My predecessor at the Michigan State University Voice Library was G. Robert Vincent, the radio, television recording and motion picture pioneer. He was the inventor of the V-Disc, the chief sound engineer at both the Nuremburg Trials and the United Nations, and an associate of Thomas Edison.

3. We all know that between the actual utterance and the transcript there is frequently a flurry of editing, so the grammar is cleaned up, factual errors are corrected, and, in journals, bracketed phrases like "sustained applause" introduced.

4. Americans have recently seen dramatic examples of the inability of a written transcript to body forth a human situation; and historians, amateur and professional, will become progressively less willing to accept the transcript filtered through typist and editor when the unfettered primary source material is available.

5. As historians we should bend all our effort, especially in precedent-making cases, to impress the general public with the superiority of the tape and all others for whom inflection serves an exponent to enlarge the value of diction, and sometimes supply meanings which are unclear or unavailable in words themselves.

6. As Voice Librarian, I support wholeheartedly all efforts to make available to scholars any and all materials which have already been made public in a significant way in courtrooms or elsewhere.

/s/Maurice A. Crane

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF WILLIAM J. EATON

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

WILLIAM J. EATON, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of the *Chicago Daily News*, and have held that position for nine years. I have been a professional journalist for twenty years.

2. In the course of my work for the *Chicago Daily News* I attended and reported on the Watergate cover-up

trial, *United States v. Mitchell, et al.* While attending the trial I heard the tape recordings that were received in evidence and played to the jury. On the basis of hearing several of the tapes, I wrote, and published in the *Chicago Daily News* on Tuesday, October 22, 1974, the article attached to this affidavit as Exhibit A. The statements in that article are true and accurate.

Further deponent sayeth not.

/s/William J. Eaton

[Verification Omitted in Printing]

Article from *Chicago Daily News,* Tuesday, Oct. 22, 1974 (Exhibit A)

"How the Watergate tapes sound"

by William J. Eaton, of our Washington Bureau

WASHINGTON—It is an eerie feeling, hearing the expletives from Richard M. Nixon and others that were deleted from the printed versions of his famous White House tapes.

From high-fidelity headsets provided at the Watergate cover-up trial comes Nixon's menacing tones to two of his confidants in the Oval Office:

"I want the most comprehensive notes on all of those that have tried to do us in . . . They are asking for it and they are going to get it . . . We haven't used the Bureau (FBI), and we haven't used the Justice Department, but things are going to change now."

Nixon's vow to take revenge on his political opponents was made on Sept. 15, 1972—nearly two months before his landslide re-election to a second term—in a conversation with H.R.Haldeman, his chief of staff, and John W. Dean, the young counsel at the White House.

His words as President were made public six months ago when he published transcripts of some of his taped discussions. But the words alone do not reveal the tone of cold fury in which Nixon denounced his enemies.

Speaking of Washington lawyer Edward Bennett Williams, for example, Nixon is enraged: "I think we are going to fix the son-of-a-bitch. Believe me. We are going to."

For the first time last week, reporters and a few dozen members of the public heard the harsh inflections in Nixon's voice as some of his White House tapes were played in the Watergate trial.

Many aspects of Nixon's personality were evident to those of us who listened to the tape. By turns he was soft-spoken, demanding, questioning, light-hearted, authoritative, puzzled.

Unless presiding Judge John J. Sirica reverses himself, however, only a relative handful of Americans ever will hear the recordings that toppled a President for the first time in history and may help convict some of his top aides of a cover-up conspiracy as well.

Sirica rejected requests by radio and television networks to obtain copies of the tapes introduced into evidence so they could be broadcast to the nation and the world.

As a result, only the 250 people who squeeze into the courtroom have been able to listen in on presidential conversations as if they were eavesdropping outside the Oval Office.

Hearing the voices gives a greater sense of reality, and in print to be disjointed fragments turns out to be the way people talk, in stops and starts.

There are mysterious sounds on some of the tapes. Clanking noises that seem to be deliberately made, for example, rouse suspicions of tape-tampering. Other background sounds are more normal—a chattering typewriter, a police siren and the clatter of coffee cups.

Tapes recorded in the President's office in the Executive Office Building were much noisier than those made in the Oval Office. The EOB tapes had a background hiss, clanking and whooshing noises.

But the President's voice came through clearly as he said, to his former Atty. Gen. John N. Mitchell on March 22, 1973:

"I don't give a shit what happens. I want you all to stonewall it, let them plead the Fifth Amendment, cover up or anything else, if it'll save it—save the plan."

Perhaps the most suspicious part of the famous March 21, 1973, tape is a long, nine-second silence right after Nixon says of Watergate conspirator E. Howard Hunt's blackmail demand: "I mean, it's not easy to deliver, but it is easy to get."

On the lighter side, Nixon clearly is making a jest when he tells campaign chairman Clark MacGregor over the telephone: "Don't bug anybody without asking me, OK?"

And he and Haldeman roar with laughter when they inform Dean in that Sept. 15, 1972, conversation that the late President Johnson had bugged Hubert H. Humphrey, his vice president and Democratic contended for President in 1968.

"Oh, God damn," Nixon says, unable to contain his laughter, although he angrily charged that Johnson had bugged his campaign plane in 1968 as well.

And Nixon inexplicably chuckles when he tells Dean to pretend that secret payments to Watergate defendants

were made through a Cuban defense fund, saying: "I would certainly keep that (laughter) that cover for whatever it's worth."

But, at least to this reporter, he seemed genuinely surprised to hear Dean say on March 17, 1973, that the White House directed the burglary of a psychiatrist's office to get records of Daniel Ellsberg, the distributor of the top-secret Pentagon Papers.

"Why?" Nixon asks in a hushed voice. "This is the first I ever heard of this." Four days later, again discussing the Ellsberg break-in, Nixon says angrily: "I don't know what the hell we did that for."

And he appears most compassionate when he comments on the death of Hunt's wife in a plane crash: "Great sadness," Nixon says with a sigh.

His controversial March 21, 1973, remarks about the payment to Hunt and other defendants, however, are matter-of-fact as if they were discussing the weather forecast.

"It is going to require approximately $1 million to take care of the jackasses that are in jail," Nixon tells Haldeman. "That could be, that could be arranged." Later, he adds in authoritative tones: "First, you've got the Hunt problem. That ought to be handled."

But Nixon, while reconciled to some additional cash for Hunt to "keep the cap on the bottle," is emphatic in rejecting clemency that would involve him personally in releasing Hunt and others from jail: "No it's wrong. That's for sure."

While the tapes are playing, almost everyone in the courtroom listens intently. Haldeman, whose words have come back to haunt him, has seemed dejected. Occasionally, he places a finger over his lips as if he wished he could silence his high-pitched, boyish voice.

Discussing White House troubles in making secret cash payments, Haldeman says on one tape: "We are so God damned square that we'd get caught on everything."

Nixon's determination to conceal links to the bugging of Democratic headquarters by his campaign aides and White House officials is a continuing theme.

In evaluating a plan to seek a new grand jury investigation, he seems enthusiastic at first but then thinks what might happen if everyone told what they knew:

"God, we can't risk that," Nixon says with concern in his voice. "I mean, uh, all sorts of shit'll break loose there."

And on the day that Nixon said he was ordering an investigation of the cover-up, he tells Dean in self-damning words:

"I have no doubts about the right plan before the election. You handled it just right. You contained it. Now after the election we've got to have another plan, because we can't have for four years, we can't have this thing—you're going to be eaten away."

The President proved prophetic. When he lost his fight to keep the telltale tapes a secret, Nixon was forced to resign the Presidency. Now, Dean, who "contained it," is a chief prosecution witness at the trial of others accused of conspiring to do the same.

The tapes, twisting slowly on their reels, are providing strong electronic evidence of an Oval Office conspiracy.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF GLEN ELSASSER

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

GLEN ELSASSER, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of The *Chicago Tribune*, and have held that position for 6 years. I have been a professional journalist for 18 years.

2. As a reporter for *The Chicago Tribune*, I attended and reported on the Watergate cover-up trial, *United States v. Mitchell, et al.* I heard most of the tape recordings that were received in evidence and played to the jury, and I have read the transcripts of the recorded conversations.

3. On the basis of hearing the tapes that were played to the jury and reading the transcripts of the same conversations that appear on the tapes, I believe that the

tapes add a new and significant dimension to one's understanding of the recorded and transcribed conversations.

4. The accuracy and reliability of the prosecution's transcripts of the taped conversations are not beyond question. During the trial, lawyers for H. R. Haldeman repeatedly challenged the accuracy of the transcripts. Alexander Butterfield testified that they contained numerous errors. Scholars and members of the public can resolve questions of accuracy for themselves only by listening to the tapes, and, probably, only by listening to some of the tapes more than once.

5. Very often on the tapes meaning is expressed by means other than words—*e.g.*, laughter, nuances of voice, pauses, and non-verbal utterances such as "uh huh." Many ambiguities of meaning in the transcripts are removed by the recordings.

6. Listening to the tapes clarified for me a number of issues which the transcripts left unresolved. I will give three examples.

a. In the transcripts it often is unclear whether Mr. Nixon is a dominant or passive personality in his dealings with Haldeman, Ehrlichman and Dean. On the tapes he is clearly in charge, and is not at all passive, at least until April 1973. Haldeman, Ehrlichman and Dean clearly were following his orders.

b. In the March 21, 1973 conversation in which John Dean warns Mr. Nixon of the growing cancer on the Presidency, Mr. Nixon and Dean discuss many aspects of the Watergate situation. After the first transcript of that conversation was released, Mr. Nixon argued that he was merely seeking information from Dean in order to find out what was happening. However, the tape recording of that conversation leaves it beyond doubt that Mr. Nixon

was not merely seeking information, but was trying to further the cover-up and "containment" of the Watergate scandal.

c. In a conversation on January 8, 1973 Mr. Nixon and Charles Colson discuss the payment of money to the Watergate burglars who were then going on trial. At one time it was argued that the purpose of such payments was humanitarian. The tape of the conversation makes it absolutely clear that the purpose was continuation of the cover-up, not humanitarianism.

7. Finally, I believe I felt the horror of Watergate most vividly when I heard the President of the United States, in a June 23, 1972 tape, refer to Watergate as "that scab," and say that it should not be investigated further because many detrimental things would be brought to light.

Further deponent sayeth not.

/s/Glen Elasser

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Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS, INC.

AFFIDAVIT OF CAROL H. FALK

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

CAROL H. FALK, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of the *Wall Street Journal*, and have held that position for five years. I worked for the *Wall Street Journal* for six years. Since November 1973 I have reported principally on the Watergate scandal, with particular attention to news developments concerning the transcripts and tape recordings of conversations in the White House. I attended the Watergate cover-up trial, *United States v. Mitchell, et al.*, listened to the tape recordings that were played to the jury, and read the transcripts of the recorded conversations.

2. During the months that I have chronicled developments in the Watergate scandal, there has been very

considerable controversy over the White House conversations relating to Watergate. President Nixon released his own transcripts of some of those conversations and gave public explanations of the meaning and intent of what he said in the transcribed conversations. The House Judiciary Committee debated conflicting interpretations of numerous critical passages in the transcribed conversations. During the cover-up trial there was much dispute over the accuracy of the prosecution's transcript of the conversations. For example, John Ehrlichman filed on October 22, 1974 a 44-page memorandum of proposed corrections in the prosecution's transcript. As I listened to the tape recordings in the courtroom, I noted numerous minor discrepancies between the wording of the prosecution's transcript and what I thought I heard on the tape recording; but, of course, I heard the tapes only once, whereas the prosecutors had the opportunity to listen to the tapes many times.

3. Because of the importance of the tapes to the entire Watergate affair, and because of the longstanding controversy concerning the meaning of the White House conversations, I believe that the American people should have the opportunity to hear the tapes for themselves, to study them, and to reach their own conclusions about the statements, decisions, and motives of the participants in those conversations. The public will learn far more from the tapes than they have learned from the published transcripts. For example:

a. In many places, the transcripts note the occurrence of laughter. But the laughter, as it actually is heard on the tapes, conveys a variety of meanings and emotions--the laughter sometimes sounds sardonic, or sarcastic, mean or bitter; sometimes it seems to express genuine good humor. The tone and character of the laughter adds much to the meaning of what people on the tapes are saying.

b. Pauses occur in many places on the tapes, some of them noted on the transcripts. But even when they are noted, the length of pauses is not indicated. On the tapes, the pauses vary enormously in length. Sometimes they are quite expressive: a short pause and quick response tend to suggest confidence, decisiveness; a long pause tends to suggest uncertainty, indecisiveness, a loss of words.

c. The transcripts do not indicate emphasis, and thereby omit some elements of meaning. For example, in a conversation on March 22, 1973, Mr. Nixon and H. R. Haldeman discuss the possibility that Charles Colson had promised clemency to E. Howard Hunt. At one point, Haldeman says: "But if Hunt thinks that's what he's been promised . . ." "He'll shut up now", continues Mr. Nixon. Haldeman responds: "He'll, he *may* shut up now," with an emphasis on "may." As I heard the tape, it was my impression that the emphasis on "may" expressed a belief that Hunt might very well *not* shut up. That suggestion is important in interpreting Mr. Nixon's subsequent comments. Other listeners might interpret Haldeman's comment differently. Members of the public should be able to hear the tapes and judge for themselves what Mr. Haldeman and Mr. Nixon were communicating to one another.

d. In a telephone conversation between Charles Colson and Hunt, Colson repeatedly asks Hunt to say no more about Watergate, and Hunt repeatedly tries to involve Colson by giving him pieces of information. Colson's expressive voice and the pace of his pleas to Hunt impressed me with the fact that he was trying desperately to end the conversation without alienating Hunt, and that Hunt was making it difficult for him to do so. The tape captures the interplay between these two personalities far better than the transcript can.

e. In a late afternoon conversation on April 25, 1973, Mr. Nixon and Mr. Haldeman discuss possible explanations of Mr. Nixon's March 21, 1973 conversation with John Dean. At several points, Mr. Nixon's voice indicates despair at the apparent impossibility of providing an innocent explanation of statements he made to Dean. Each time, Haldeman makes a reassuring suggestion that revives Mr. Nixon's spirits. From the transcript of that conversation, one cannot be sure of the extent to which Mr. Nixon and Mr. Haldeman sincerely believe the explanations they discuss. The tape is certainly a far better basis on which to make an evaluation. The public should be able to hear the tape and judge for itself.

f. Finally, I was struck by the matter-of-fact tone in which participants in the White House conversations, at least until April 1973, discussed almost incredible decisions and courses of action. The tone of their voices and the pace of their conversation communicated to me a belief on their part that they could rationalize and justify their actions, and that no one would successfully challenge them. How much the participants genuinely understood that they were engaged in wrongdoing, and how much they sincerely believed that their actions were morally justified is an extremely difficult matter to assess. But I believe it is important that the American people have the best evidence to make that assessment, so that they can understand and perhaps guard against the kind of reasoning that produced the Watergate cover-up.

Further deponent sayeth not.

/s/Carol H. Falk

[Verification Omitted in Printing]

AFFIDAVIT OF JOHN HOPE FRANKLIN

1. I am John Hope Franklin, John Matthews Manly Distinguished Service Professor of History at the University of Chicago. I received the A.B. degree at Fisk University and the M.A. and Ph.D. degrees at Harvard University. I am the author of several books in United States history, among which are *From Slavery to Freedom, A History of Negro Americans; Reconstruction After the Civil War;* and *The Militant South.* I am co-author, with John W. Caughey and Ernest R. May, of *Land of the Free,* a history of the United States for junior high schools, and co-editor, with Isadore Starr, of *The Negro in Twentieth Century America.* I am President of the Organization of American Historians and of the United Chapters of Phi Beta Kappa. I have served on the Advisory Committee of the Oral History Project, and as chairman of the Committee on Television of the American Historical Association. I served on the Board of Foreign Scholarships for seven years and was its chairman from 1966 to 1969. In 1973 I served as Lincoln Lecturer for the Department of State in South America, the South Pacific and Southeast Asia.

2. I have used oral source materials collected by such institutions as Fisk University and Columbia University and have found them invaluable aids in my research and teaching. I have also worked closely with the staff members of the Civil Rights Documentation Project during the time that I served on the Project's Advisory Council; and I was one of the members who urged that primary consideration be given to the collection of oral source material. I have supervised the work of several doctoral candidates who have relied heavily on oral source materials, without which their dissertations would have suffered considerably. Indeed, one of them became so deeply committed to such materials that she has

established an oral history project at Roosevelt University where she teaches. I am now writing the biography of George Washington Williams, a nineteenth century Negro American historian, who as early as 1880 supplemented his research in manuscripts with an extensive use of oral sources. Without such sources he would have been unable to write his historical works and I would be unable to make the evaluation of his work as an historian that I am now able to make.

3. I have read much of the printed transcripts of the Nixon tapes that were played in the Watergate cover-up trial. While they are of immense value to historians interested in such matters, they are *no substitute* for the tapes themselves. The transcripts fail to convey the tone of voice, the emphases on certain words and phrases, and the pauses and other qualities of speech that only the tapes themselves can convey. For example, some of the statements in the transcript may give the impression that they were declarations when, as a matter of fact, the inflections indicate reservations that place doubts on their status as unequivocal declarations. Other statements contain pauses and other evidences of hesitation that cause one to question the certainty that the printed transcripts indicate. No printed transcript is or can be a substitute for the obligation of the historian or some other investigator to make certain judgments for himself regarding the real meaning or significance of the statements that were made.

4. The Watergate trials were, in a sense, a test of the American public's capacity to grasp the full significance of what had transpired at the very highest level of our government. Even in the aftermath of the trials the public cannot know what actually transpired and, thus, cannot reach a satisfactory resolution of the issues involved without access to the same materials, including the tapes,

to which the jury itself had access. Free access to the tapes and their free dissemination among interested persons would contribute greatly to the public understanding of the administration of justice at this unusual juncture in our history. The people will decide such matters for themselves; and if their decisions are based on all available evidence they are more likely to reach a sound decision than they would if certain material evidence were denied them.

/s/John Hope Franklin

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF HAYS GOREY

DISTRICT OF COLUMBIA)
: ss.:
CITY OF WASHINGTON)

HAYS GOREY, being first duly sworn, deposes and says as follows:

1. I am a correspondent in the Washington Bureau of Time Magazine. I have held that position for approximately ten years and have been a professional journalist for approximately twenty-five years. I report on politics and government, and covered the 1968 and 1972 Presidential campaigns for Time Magazine.

2. For more than two years I have reported on all aspects of the Watergate scandal. I covered the break-in trial, the trial of Dwight Chapin, and the recent cover-up trial (*United States v. Mitchell, et al.*). I attended the cover-up trial during the entire period when tape recordings were being played to the jury, except for part of one day.

3. During the course of my attendance at the cover-up trial, I listened to virtually all of the tape recordings that were received in evidence and played to the jury. I also have read the transcripts of those recordings.

4. On the basis of listening to the tape recordings and reading the transcripts, I believe that the recordings provide very important elements of meaning which are not available from the transcripts, and that listening to the recordings is indispensible for a full understanding of the recorded conversations. The following examples illustrate the kind of understanding which can be gained only by listening to the recordings.

a. Phrases like "uh-huh," and "um-hum," appear throughout the recordings and the transcripts. In the transcripts, they are all the same, or nearly the same. In

the recordings, those expressions are vastly different: an "um-hum" in one context, and said with one tone of voice, can mean mere acknowledgement of an idea or a proposal; in another context and said in another tone of voice, it expresses surprise, or determination, or acceptance or rejection. I recall that on one occasion during the trial there was a serious clash between John Ehrlichman and James Neal over whether a particular "uh-huh" uttered by Ehrlichman during one of the taped conversations signified acceptance or rejection of the idea being discussed. A reader of the transcripts simply could not tell; but a person who listened to the tape could easily decide that on that occasion Mr. Ehrlichman's "uh-huh" unmistakably signified acceptance.

b. At many points on the tapes, while one person is speaking, another will be heard to speak at the same time. A person listening to the tape hears the first speaker without interruption, and notes a simultaneous comment by another person. The transcripts, however, do not present simultaneous speech. They break the flow of the first speaker's sentences to interject the simultaneous utterances of the second speaker. The result is that a reader has a much more difficult time understanding what is being said, and it may even be impossible for him to reconstruct exactly which comment was a response to which, which comments interrupted the conversation and which were uttered simultaneously, and which comments were part of the general flow of the discussion and which were mere asides.

c. Often, the transcripts don't make clear whether a statement is made or an instruction is given tentatively or forcefully. For example, in the March 22, 1973 tape, Mr. Nixon tells John Dean to go to Camp David. It is clear from the tape recording that Mr. Nixon was giving a firm instruction, whereas from the transcript it might appear that he was making a tentative suggestion.

d. The conversations among Mr. Nixon and his associates were filled with what they called "scenarios," that is, enactments of possible scenes, test runs of possible combinations of statements. On the tape recordings, these "scenarios" are clearly separated from normal conversation by changes in tone of voice and inflection. However, in the transcripts it is difficult in many instances to decide whether a particular piece of conversation is part of a scenario or is normal discourse.

e. The transcripts distort the role of Mr. Nixon. They make him appear very tentative and unsure of himself, and they give the impression that his associates were pushing him around. By contrast, on the tape recordings, Mr. Nixon sounds firm and very much in control, at least until sometime in April, 1973. From that point on, the tapes record a number of late night conversations between Mr. Nixon and Haldemann and Colson as to ways of dealing with the fact that Magruder and Dean were talking to the prosecutors. In those conversations, Mr. Nixon sounds very much like a man who is deeply worried. These variations in Mr. Nixon's voice (and the variations in the state of mind it reflects) cannot be communicated in the transcripts.

Further deponent sayeth not.

/s/Hays Gorey

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF RICHARD S. KIRKENDALL

STATE OF INDIANA)
: ss.:
CITY OF BLOOMINGTON)

RICHARD S. KIRKENDALL, being first duly sworn, deposes and says as follows:

1. I am Professor of History at Indiana University and also Executive Secretary of the Organization of American Historians. In addition, I am Director of the Oral History Project at Indiana University and a former president of the Agricultural History Society. I moved to my present positions in 1973 after receiving the Ph.D. from the University of Wisconsin in 1958 and serving from 1955 to 1958 as a member of the history department at Wesleyan University and from 1958 to 1973 as a member of the history department at the University of Missouri-Columbia. I am the author of numerous articles and reviews and of three books: *Social Scientists and Farm Politics in the Age of Roosevelt*

(University of Missouri Press, 1966), *The Global Power: The United States Since 1941* (Allyn and Bacon, 1973), and *The United States, 1929-1945: Years of Crisis and Change* (McGraw-Hill, 1974). I am also the editor of three books: *The Truman Period as a Research Field* (University of Missouri Press, 1967), *The New Deal: The Historical Debate* (John Wiley, 1973), and *The Truman Period as a Research Field: A Reappraisal, 1972* (University of Missouri Press, 1974). I am at work on a multi-volume biography of Harry Truman which I began more than a decade ago and regard as a lifetime project, and my most pressing writing responsibilities now are book-length manuscripts on "Missouri in Modern Times," which is scheduled for publication by the University of Missouri Press in the near future, and "The Early Life of a Global Power: The United States in the Truman Years," which is under contract for publication by Indiana University Press in 1976.

2. I have used oral sources of history in my work on social scientists and in my study of Harry Truman. I have interviewed the people involved, have used interviews with them prepared by oral historians, have listened to speeches and conversations by Truman and other historical personalities, and have listened to recordings of their speeches and watched films on aspects of their lives and careers. I have used these materials both to gain access to evidence that is not available in the written record and to gain greater understanding of the evidence the written record contains. The opportunities to hear their views as well as to witness ways in which they lived portions of their lives have added greatly to my understanding of these people. As a biographer with a strong interest in personality, I would stress the value of oral materials for the contributions they can make to an understanding of the personalities of significant historical figures.

3. A recent opportunity to prepare the written commentary for a recording of Truman speeches and remarks provided a fresh illustration for me of the value of oral materials. The recording supplied important insights into the complexity of the man. Students who use the record will hear him behaving in a variety of ways and will be encouraged to reject simple conceptions of him such as one finds in *Plain Speaking*. The record also supplied, to cite another example, insight into the sense of accomplishment that Truman had when he left office. Students hearing that will, I expect, be more likely to explore the reasons for that sense of accomplishment than they would be if they only read that he felt that way in 1953.

4. The value of the Nixon tapes seems especially obvious. The transcripts seem to be filled with ambiguities; interpretation of the transcript is often very difficult, certainly much more difficult than interpretation of a speech or a carefully dictated letter or memorandum. Historians reading the transcripts will frequently feel compelled to turn to the tapes for help in determining the meaning of recorded remarks. If those steps are taken, then we will gain much greater understanding of the workings of the Nixon White House than we can obtain of any other presidency.

/s/Richard S. Kirkendall

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FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF FINLAY LEWIS

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

FINLAY LEWIS, being first duly sworn, deposes and says:

1. I am a reporter in the Washington Bureau of *The Minneapolis Tribune*. I have been a professional journalist for more than ten years, have been a reporter for *The Minneapolis Tribune* since 1966, and have served in its Washington Bureau since 1972.

2. As a reporter for *The Minneapolis Tribune*, I have covered virtually all aspects of Watergate, including the break-in trial, the Ervin Committee hearings, the hearings in this Court on the subpoenas for and custody of the White House tapes, the impeachment proceedings in the House Judiciary Committee, and the recently concluded cover-up trial. I attended the trial regularly, listened to

almost all of the tape recordings that were received in evidence and played to the jury, and read the transcripts of the recorded conversations.

3. On the basis of hearing the tape recordings that were played to the jury and of reading the transcripts of those recordings, I firmly believe that the recordings make a unique and significant contribution to an understanding of how the cover-up occurred and of the impact of Watergate on the Office of the Presidency and on President Nixon. Listening to the tapes provides an absolutely vital insight into the Watergate affair that cannot be obtained by simply reading the transcripts.

4. The first tape played to the jury was the recording of a conversation in the Oval Office on September 15, 1972. At that time Mr. Nixon was at the peak of his power: he was looking forward to a re-election landslide, and that very day the federal grand jury indicted seven low-level operatives in the Watergate break-in, suggesting that the scandal had successfully been contained. I vividly recall my reaction on hearing that tape, because it was my first opportunity to hear Mr. Nixon without the trappings and formality of a public appearance. The tape revealed the private Nixon, seemingly secure in the power and secrecy of the Oval Office. I was struck by the assertiveness of Mr. Nixon's voice. The tape presented him as an impressive individual—very smart, forceful, quick in responding, and very much in control. I was surprised at the rapid pace of his conversation, at his strength, and at his sure grasp of the situation presented to him. The performance on the tape was also chilling. When Mr. Nixon said he would use his power to harm his "enemies," one could tell from his voice that he was deadly serious, and meant exactly what he said.

5. I was also struck by the contrast between the September 15, 1972 tape and tapes from April 1973. By

April, the self-confident Mr. Nixon of September had disappeared, and had been replaced by a man who was disoriented, unsure of himself, and not fully in control. The contrast is captured on the tapes, and really cannot be derived from the transcripts.

a. The tape of a telephone conversation on April 14, 1973 between Mr. Nixon and H. R. Haldeman presents Mr. Nixon stumbling over his words, breathing heavily, with fatigue and tension in his voice. At this stage, he plainly is not in control, but is subject to the initiative and suggestions of Mr. Haldeman.

b. On April 25, 1973, the tape of a late evening telephone conversation between Mr. Nixon and H. R. Haldeman shows a frightened President. His mood shifts rapidly from dark pessimism to exuberant optimism, to aggressive militancy, to composure and stoical fatalism. These shifts are expressed much more by his voice than by his words. To me, this tape revealed something about how Watergate got out of Mr. Nixon's control. He had neither a consistent understanding of what was happening or what was at stake, nor a consistent emotional response to developments. Consequently, he was unable to formulate and execute a consistent strategy to deal with Watergate. His response to Watergate developments was to vacillate between compliance and resistance to demands for disclosure, and between loyalty to and separation from his aides and associates. That response was a product of the emotions that are captured on the April 25 tape. It was the last tape which the prosecution played to the jury, and it summed up the impact of Watergate on Mr. Haldeman, on Mr. Nixon, and on the Presidency.

6. On the tape of a March 21, 1973 conversation, Mr. Nixon and John Dean discuss the payment of hush money to E. Howard Hunt, Jr. At one point, Mr. Nixon

says to Dean: "For Christ's sake, get it." The interpretation of that statement was the subject of considerable debate within the House Judiciary Committee, which was relying on the transcript of the conversation rather than on the tape recording. But when one hears Mr. Nixon making that statement on the tape, it becomes clear that he is giving Dean a direct order to get hush money for payment to Hunt. The tape removes the ambiguities of the transcript.

7. In many instances, the conversations in the transcripts seem not to lead anywhere. The participants return to the same subject over and over again. The transcripts do not make clear when something has been decided. However, a person listening to the tapes can tell from the tone of voice of the speakers when a decision has been made, in contrast to leaving a subject inconclusive.

8. The transcripts are confusing. They attempt to mirror living conversations. Since we do not really know the non-public personalities of the participants, it is very difficult for readers to reconstruct the conversations from the transcripts alone. The tapes make much more sense. Disjointed phrases, which do not match up with one another when read, do match up when heard. The total conversations have meaning and direction when they are heard.

Further deponent sayeth not.

/s/Finlay Lewis

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,
Plaintiff,

-against-

JOHN N. MITCHELL, et al.,
Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF ARTHUR LINK

STATE OF NEW JERSEY)
: ss.:
CITY OF PRINCETON)

ARTHUR S. LINK, on his oath, deposes and says:

1. I am a historian, writer, editor, and Edwards Professor of American History at Princeton University, where I also serve as Director of the Woodrow Wilson Project and Editor of *The Papers of Woodrow Wilson.*

2. I have taught at various times since 1943 at North Carolina State University, The University of North Carolina, Northwestern University, as well as at Princeton. I was the Harmsworth Professor of American History at Oxford University, 1958-59, and have lectured in various colleges and universities in this country, South America, Europe, and Japan. I won the Bancroft prize for the best work in American biography in 1957 and 1961. I was President of the Southern Historical Association,

1968-69, and have served as a member of the National Historical Publications Commission, the Executive Council of the Organization of American Historians and of the Board of Editors of *The Journal of American History* and *The Journal of Southern History*. I am also a member of the American Philosophical Society and the American Academy of Arts and Sciences, as well as a Fellow of the Society of American Historians.

3. Although my major scholarly work has been on Woodrow Wilson, I have taught American history in the twentieth century since 1943 and am the co-author of a widely used textbook covering all phases of American history from 1900 to 1972. The name of this textbook is *American Epoch*, and it is published by Alfred A. Knopf, Inc. of New York. The fourth edition of this book was published in 1973.

4. In my work on Woodrow Wilson and twentieth-century American history, I have used a number of presidential collections extensively. It is no exaggeration to say that one cannot write anything like a reliable history of a presidential administration without access to the papers of the President involved. Otherwise, it is very difficult, indeed usually impossible, to determine the President's sources of information, the processes leading to presidential decisions, and the relations between a President and his subordinates, the Congress, public opinion, etc.

5. It is my opinion that a comprehensive edition of the conversations on the so-called Nixon tapes is absolutely essential for any kind of scholarly work on the Nixon administration. We have already seen enough transcripts of these tapes to know that it will be impossible to do any serious work in the Nixon period without access to the tapes, and a comprehensive edition of them prepared according to the modern canons of

scholarship would be an enormous boon. Speaking personally, my collaborator and I would certainly use them extensively in preparing the next edition of *American Epoch*.

6. The Nixon tapes are oral history of a particularly valuable kind. Oral history, as it is commonly understood, consists of tapes or transcripts of conversations with individuals who played significant roles in the past, and who, years later, have reminisced about themselves, other persons, and events. The evidence on the Nixon tapes, on the contrary, is of a very different nature. It obviously consists of the actual conversations of a President with members of his staff and others over an extended period. Insofar as I know, such evidence is unique in the history of presidential administrations.

7. The fact that President Nixon himself caused a bowdlerized version of the conversations on the so-called Nixon tapes makes it all the more necessary for historians to have easy access to a reliable comprehensive edition.

/s/ARTHUR S. LINK

[Verification Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Law No.
74-110

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN N. MITCHELL, et al.,

Defendants.

IN RE WARNER COMMUNICATIONS INC.

AFFIDAVIT OF H. WAYNE MORGAN

STATE OF OKLAHOMA)
: ss.:
CITY OF NORMAN)

H. WAYNE MORGAN, on his oath, deposes and says:

1. I have been Professor of History at the University of Oklahoma, Norman since 1972. I have also taught at San Jose State College, San Jose, California (1960-1961), and at the University of Texas at Austin (1961-1972). I received my Ph.D. from the University of California at Los Angeles in 1960.

2. I am the author of several books dealing with the history of the United States between the Civil War and World War I. They include:

William McKinley and His America (Syracuse University Press, 1963).

America's Road to Empire: The War With Spain and Overseas Expansion (John Wiley and Sons, 1965).

From Hayes to McKinley: National Party Politics, 1877-1896 (Syracuse University Press, 1969).

Unity and Culture: The United States, 1877-1900 (Penguin Books, 1971).

3. My major concern as a historian to date has centered on politics and diplomacy at the presidential level during the late nineteenth century, especially the McKinley administration. The records for that administration are not voluminous, and analyzing decisions made during that period (1897-1901) is especially troublesome to scholars. Some of these decisions have had international as well as national, and long-lasting as well as topical importance. I have in mind especially the decision-making process which took the United States into war with Spain in 1898, and the development of the administration's decision to acquire the Philippine Islands as a result of that war in 1898-1899. The evidence for this last decision is very sketchy, and the subject of much controversy among historians. Some believe the decision part of a conscious desire to expand American power overseas, especially in relation to China, with long-lasting results. Other scholars see the decision as an unexpected result of the war, which the administration was not eager to make. The sources for both the thinking of President McKinley, the key actor in this drama, and for his advisers are sketchy. I can think of no case in American history where verbatim records of the discussions involved would be of greater service to the historian.

4. After several years of research in political and diplomatic materials, I am thoroughly convinced of the value of sound recordings and visual evidence, used in conjunction with literary records. Much of the decision-making process involves tone, nuance, and suggestion,

things which do not always emerge clearly in written records. I am confident that if sound recordings could have been made during the McKinley administration, relating to the problems I have outlined above, historical judgments would be much more final and satisfying.

5. As a citizen and as a scholar, I believe that the public, both for current and historical reasons, are entitled to know the reasons behind governmental decisions which affect their lives and fortunes. I am confident that sound recordings, in addition to transcripts, add a whole new dimension to the public record, and that the public and posterity are entitled to know what that full record is.

/s/H. Wayne Morgan

[Verification Omitted in Printing]

APPENDIX P

Memorandum Opinion and Order

of Judge Sirica, dated

April 4, 1975

(located at 29a-34a of Petition for Certiorari)

APPENDIX Q

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1510

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et al.,
WARNER COMMUNICATIONS, INC.,
Appellant,

MEMORANDUM OF POSITION OF APPELLEE
HARRY ROBBINS HALDEMAN

This appeal raises issues upon which appellee Haldeman took no position in lower Court. This appellee's position is that the tapes which appellant seeks to obtain and publish should not be made public for the reason that such publicity would seriously jeopardize this appellee's right to a fair trial in the event his pending appeal in Case No. 75-1381 results in a grant to him of a new trial.

/s/ John J. Wilson

/s/ Frank H. Strickler
815 - 15th Street, N.W.
Washington, D.C. 20005
Attorneys for Appellee
Haldeman

[Certificate of Service Omitted in Printing]

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 75-1409 and 75-1410

UNITED STATES OF AMERICA,

v.

JOHN N. MITCHELL, et al.

NATIONAL BROADCASTING CO., et al.

and

WARNER COMMUNICATIONS, INC.,

Appellants.

Appeals from the United States District Court
for the District of Columbia

MEMORANDUM FOR THE UNITED STATES

The United States submits this memorandum in connection with the consolidated appeals from the order of the district court denying appellants' applications for access to the tape recordings of Presidential conversations introduced into evidence in the trial of *United States v. Mitchell, et al.* (D.D.C. Crim. No. 74-110, *appeal docketed*, Nos. 74-1381-84, D.C. Cir. April 14, 1975), for the purpose of making copies of the recordings for re-publication to the public.

The sole interest of the United States in these appeals is to ensure that the defendants in *United States v.*

Mitchell, et al. receive a fair trial.* It is the belief of the United States that, because the recordings were played at trial and because transcripts of the recordings were published and extensively analyzed by the media at that time, there is little likelihood that re-publication of copies of the recordings in the future would preclude affording defendants a fair retrial in the event that the outstanding convictions were reversed. Nevertheless, since the extent of the dissemination of these tape recordings or the manner in which they will be reproduced and broadcast is entirely speculative at present, the government is unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial.

Respectfully submitted,

HENRY S. RUTH, JR.,
Special Prosecutor,

PETER M. KREINDLER,
Counsel to the Special
Prosecutor,

KENNETH S. GELLER,
Assistant Special
Prosecutor,

1425 K Street, N.W.
Washington, D.C. 20005

---

* Although the Special Prosecutor represented the United States in the court below because the proceedings stemmed from a prosecution within his jurisdiction, see 28 C.F.R. §0.38, the issues presented in these appeals raise concerns relevant to the totality of the federal justice system. Accordingly, before determining the position of the United States in these appeals, the Special Prosecutor consulted with the Assistant Attorney General in charge of the Civil Division.

[Certificate of Service Omitted in Printing]

APPENDIX S

Opinion of Court of Appeals,

dated October 26, 1976

(located at 1a-27a of Petition for Certiorari)

APPENDIX T

Order of Court of Appeals

Denying Petition for Rehearing,

dated December 3, 1976

(located at 28a of Petition for Certiorari)

APPENDIX U

United States Court of Appeals

for the District of Columbia Circuit

[Caption Omitted in Printing]

Order

On consideration of the suggestion for rehearing *en banc* of respondent Richard Nixon, and a majority of the

judges of the Court in regular active service not having voted in favor thereof, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestion for rehearing *en banc* is denied.

Dated: Dec. 3, 1976 *Per Curiam*

APPENDIX V

United States Court of Appeals

for the District of Columbia Circuit

[Caption Omitted in Printing]

Order

On consideration of the motion of respondent Nixon for stay of mandate, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a period of 30 days from the date of this order, and, it is

FURTHER ORDERED by the Court that during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution, in accord with this Court's opinion of October 26, 1976.

Per Curiam

Circuit Judge MacKinnon would not remand the record

Dated: Dec. 3, 1976

APPENDIX W

Record Group 267
Job No. NN369-89

GENERAL SERVICES ADMINISTRATION

Accession Inventory

Source: Supreme Court of the United States

Location: Supreme Court Building
1 First Street, NE
Washington, DC 20543

The following Accession Inventory is hereby agreed to by the undersigned duly authorized representatives of the agency named above and of the Archivist of the United States, respectively; and the records are accepted for deposit with the National Archives of the United States.

Description of Records: Audiotape recordings of oral arguments before the Supreme Court during the 1972 term. Tapes are numbered from 883-900 and 1-26. Special items include tape 889A Justice Harlan Memorial Service and tape 899A Justice James Byrnes Memorial Service. Note also that tape 900 has three reels and tape 1, 2, and 3 are composed of four reels each.

Restrictions on the Use of Records: (a) The tapes may be played for Federal personnel in connection with official duties and to the general public for serious scholarly and legal research. (b) Typewritten transcriptions of the oral arguments may be furnished to these persons at a fee provided that, in each instance, three copies of these transcriptions are deposited in the Library of the Court. (c) Copies of the tapes may not be furnished to persons other than the Justices without the permission of the Marshal of the Court, and unless three years shall have

expired since the argument of a recorded case. (d) The National Archives may not identify the voices of members of the Court in connection with any use of the tapes, either when they are being played or in making or furnishing transcriptions. (e) Copies of the tapes will not be reproduced for commercial purposes.

Executed in duplicate at Washington, DC., this 9th day of April, 1974 A.D.

/s/F. M. Hepler
Representing the Supreme Court
of the United States

/s/James W. Moore
Representing the Archivist
of the United States

Supreme Court, U. S.
FILED
FEB 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE IN OPPOSITION

FLOYD ABRAMS
EUGENE R. SCHEIMAN
CAHILL GORDON & REINDEL
Counsel for Respondents
80 Pine Street
New York, New York 10005

February 5, 1977

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IN THE

Supreme Court of the United States

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE IN OPPOSITION

Statement of Issue Presented for Review

Did the United States Court of Appeals for the District of Columbia correctly hold that, pursuant to the long established common-law right of all citizens to inspect and copy public records, television and radio broadcasters should be permitted to copy the White House tapes played in open court and introduced in evidence in *United States* v. *Mitchell, et al.*, for the purpose of broadcasting them to the public?

Statement of the Case

The trial of former Attorney General John Mitchell, former White House aides H. R. Haldeman, John Ehrlichman and Robert Mardian and attorney Kenneth W. Parkinson commenced before Judge Sirica in the United States District Court for the District of Columbia on October 1, 1974. Central to the trial were the so-called White House tapes introduced in evidence by the prosecution. The trial lasted over 13 weeks and it is estimated that approximately 1900 members of the public attended some or all of the trial. (JA 19)* Each person attending the trial was furnished with earphones which permitted him to listen to the White House tape recordings as they were introduced in evidence and played to the jury. Transcripts of the tape recordings were published in newspapers, magazines and books. And, as petitioner's brief correctly observes, the transcripts "continue to be available at book stores around the country" (Br. p. 14).

On November 12, 1974, a group of broadcasters including National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and CBS Inc., together with the Radio Television News Directors Association, filed a petition seeking the opportunity to copy the tapes introduced in evidence so as to broadcast them to the public. (JA 5-6) On November 13, 1974, Public Broadcasting Service joined the application. (JA 13-14)

On November 19, 1975, the application of the broadcasters (which had been made before Judge Sirica) was assigned to Judge Gesell (JA 12), who directed the Clerk of the Court to prepare a statement in affidavit form detailing the mechanical procedures followed during the *Mitchell* trial in reproducing, playing to the jury and receiving in evidence the tapes and indicating any facts bearing upon the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved. All parties served with the broadcasters' application, including all the defendants, the Special Prosecutor's Office and former President Nixon, who desired to support or oppose the application were ordered to file written positions with respect thereto by November 26, 1974.

* References to "JA" are to the Joint Appendix filed with the Court of Appeals.

On November 26, 1974, the United States filed a statement concluding that the "Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted and, accordingly, does not oppose the motion." (JA 27)

The affidavit filed on November 26, 1974 by James F. Davey, Clerk of the United States District Court for the District of Columbia, confirmed that the reproducing of tapes introduced in evidence could be accomplished without either interfering with the presentation of evidence or threatening the integrity of the original court exhibits. (JA 22-23)

No opposition was filed by any of the defendants in the *Mitchell* trial with respect to the broadcasters' application.*

* Of the five defendants, only one—H. R. Haldeman—filed any document with either the district court or the Court of Appeals. That was a one-sentence statement filed by Mr. Haldeman in the Court of Appeals opposing the broadcasters' application on the ground that it could prejudice his rights, if he should be granted a new trial. Mr. Haldeman's filed document did not state when this conclusion was reached and why it was not expressed to Judge Gesell; how it was believed any prejudice would or could result; and what legal basis, if any, there was in support of his opposi-

The only opposition to the broadcasters' application was filed by former President Nixon, who contended, *inter alia,* that "broadcast of the tapes by the applicants" would "further intrude" on the need for confidentiality in presidential discussions and would violate the privacy of and embarrass individuals, including Mr. Nixon, whose voices were contained on the White House tapes. (JA 29-38)

On December 5, 1974, Judge Gesell entered an opinion and order (JA 55-62) concluding that "[t]he tape exhibits are in evidence and have therefore come into the public domain and the public should have an opportunity to hear them." (386 F.Supp. at 642) (JA 60). Judge Gesell concluded that:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. ***Ex parte Drawbaugh,*** 2 App. D.C. 404, 407 (1894). ***See also, United States*** v. ***Burka,*** 289 A.2d 376 (1972); ***Belt*** v. ***Pr. George's County Abstract Co.,*** 73 Md. 289, 20 A. 982 (1890)." (386 F.Supp. at 641) (JA 57; emphasis in original)

tion. Nor did Mr. Haldeman seek review of the decision of the Court of Appeals by this Court.

The Court of Appeals correctly held with respect to the one-sentence opposition filed with it that "[t]his pro forma statement hardly warrants careful attention." (20a, n.47) Petitioner's excerpted version of this statement (Br. p. 10) hardly does justice to the language or meaning of the Court of Appeals.

The general right of the public to have access to and copy exhibits, Judge Gesell held, was especially reenforced in this particular case by the directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457 (1970). Observing that there was "congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels", Judge Gesell concluded that "the public should have the opportunity to hear [the tapes]." (386 F.Supp. at 642) (JA 58, 60)

Judge Gesell then dealt with and rejected the arguments against broadcasting the tapes by former President Nixon. Noting that the Court had "carefully reviewed transcripts of the tapes in issue" and that it was apparent that Judge Sirica had "assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial," Judge Gesell concluded that:

> "Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words

cannot be retrieved; they are public property and his opposition is accordingly rejected." (386 F.Supp. at 642) (JA 59)

The opinion concluded with a request for suggestions from the parties by January 2, 1975 as to how the tapes should be made available to the public.

On December 27, 1974, the broadcasters and Warner Communications, Inc.* ("Warner") filed a memorandum and proposed order before Judge Gesell setting forth their detailed suggestions as to how the tapes could be reproduced and distributed to the public in a manner consistent with Judge Gesell's order of December 5, 1974. By order dated January 8, 1975, Judge Gesell declined to accept the detailed suggestions of the broadcasters and Warner with respect to the copying and distribution of the tapes. (386 F.Supp. at 643) (JA 78) Judge Gesell thereupon denied the pending applications without prejudice and referred the matter back to Judge Sirica for any further action. (386 F.Supp. at 643-44) (JA 78)

After the conclusion of the *Mitchell* trial, Judge Sirica, on March 6, 1975, held a hearing at the request of the applicants with respect to the status of the application. At the hearing, Judge Sirica requested briefing as to whether the *Mitchell* trial should be deemed over for purposes of his consideration about whether or not to permit the copying of the tapes. After submission of briefs, Judge Sirica entered an order (JA 138-43) denying immediate access to the tapes. The primary basis for the decision was Judge

* Warner filed a separate application for leave to copy the tapes on December 2, 1975. (JA 41-2) The broadcasters' appeal from Judge Sirica's ruling to the Court of Appeals was docketed as No. 75-1409; Warner's was docketed as No. 75-1410. (1a). Petitioner has chosen to reverse the order of the two cases and to treat them as one in his petition for certiorari.

Sirica's conclusion that public dissemination of the tapes might be prejudicial to the convicted defendants in the *Mitchell* case should a re-trial be ordered.

The decision of the Court of Appeals from which a writ of certiorari is now sought reversed Judge Sirica's decision—and did so on narrow and explicitly non-constitutional grounds. Holding that at common law "a right to inspect and copy public records" has long existed (8a)—a right not denied by Mr. Nixon (12a)—the Court held that the common law right extended as well to Court exhibits. Acknowledging that the right of access to judicial records was not absolute, the Court concluded that Judge Sirica had abused his discretion by permitting the "diminished interests in confidentiality" of already publicly heard tapes "to interfere with the public's right to inspect and copy the tapes." (17a)

The Court dealt first with Judge Sirica's conclusion that absent a "compelling reason" to make the tapes public he would not do so because of the possibility of interfering with the rights of the Mitchell defendants in any new trial which they might be afforded by virtue of appellate review of their convictions. Concluding that the district court had "misconceived the nature of its discretion" by placing the burden in the case on the broadcasters rather than on Mr. Nixon, the Court of Appeals held the risk of interfering with the rights of the defendants at a "hypothetical second trial" far too indefinite; insufficiently grave (in that the tapes had all been held to be admissible evidence); and all but totally unsupported by the very defendants the order was designed to protect.*

* As noted previously, only defendant Haldeman filed any opposition to the broadcasters' application and that was a pro forma opposition. (20a, n.47).

The Court of Appeals further held that Judge Gesell had not abused his discretion in determining that the tapes could be inspected and copied.* The "privacy" considerations relied upon by Mr. Nixon were rejected, as were Mr. Nixon's arguments that some kind of residual deference should be paid to presidential conversations after they had been played in open court and after their widespread publication.

The Court of Appeals further ordered that, on remand, a plan be devised which would assure prompt distribution of the tapes "on an equal basis to all persons desiring copies". On motion of Mr. Nixon, the Court of Appeals stayed its mandate pending the filing of a petition for certiorari; it did remand the record to Judge Sirica for the limited purpose of permitting the adoption of a plan of distribution of the tapes to the public.**

ARGUMENT

As is evident on examination of the decision of the Court of Appeals, it is based in its entirety on a body of law which is neither constitutional nor uniquely federal in nature.*** Instead, it is based upon the long-established "common law right to inspect public records" and to copy those records. (9a) As such, it is precisely the type de-

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* The Court decided the issue despite the failure of Mr. Nixon to file a cross-appeal. (21a, n.52).

** On January 11, 1977, the broadcasters and Warner submitted a plan to Judge Sirica pursuant to which the National Archives and Recording Service (the "National Archives") would produce and distribute the tapes to the public. The National Archives had previously agreed to accept the responsibilities involved in the plan submitted.

*** As phrased by the Court: "[w]e find no need, and therefore have no occasion, to decide the novel constitutional question of whether a ban on inspecting or copying the tapes would offend the First, Sixth or Fifth Amendments to the Constitution." (11a)

cision that the Court has long since concluded should not ordinarily be reviewed. *Del Vecchio* v. *Bowers,* 296 U.S. 280, 285 (1935).

Not only is the decision one relating to the common law; it is also one arising out of a singularly unique fact situation, one unlikely to recur in the history of the republic. The right to reproduce copies of court exhibits is one which, as the Court of Appeals observed, is "a precious common law right, one that predates the Constitution itself." (15a). But the objections cited by petitioner to permitting the reproduction of *these* court exhibits not only appear never to have been made before, but seem surely unlikely to be made again. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962) *reh. denied,* 371 U.S. 854 (1962); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Nor do the three "propositions" proferred by petitioner as arising out of the decision of the Court of Appeals set forth any basis for review by this Court. The suggestion that the Court's decision violates either the letter or spirit of this Court's ruling in *United States* v. *Nixon,* 418 U.S. 683 (1974) was responded to by the Court of Appeals itself in its conclusion that:

> "In *United States* v. *Nixon,* 418 U.S. 683 (1974), The Supreme Court spoke of the 'high degree of deference' owed to Presidential conversations. The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to provide 'protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.' Thus the Court stated,
>
> > "'[T]he District Court has a very heavy responsibility to see to it that Presidential conversations,

which are either not relevant or not admissible, are accorded that high degree of respect. . . .'

"And again:

"'[T]he District Judge will at all times accord to Presidential records that high decree [sic] of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material.* . . .'

"By definition, however, the tapes played at trial are no longer confidential. Thus appellee is left to argue that somehow it would be 'unseemly' to allow tapes of White House conversations to be marketed and publicly distributed. But this is essentially a question of taste, and provides a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recording of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed. In any event, in light of the strong interests underlying the common law right to inspect judicial records—interests especially important here given the national concern over Watergate—we cannot say that Judge Gesell abused his discretion in refusing to permit considerations of deference to impede the public's exercise of their common law rights." (24a-25a)

Apart from what we believe to be the evident correctness of the Court of Appeals in this regard, its decision makes clear that as to this issue it was simply holding that Judge

Gesell had not "abused his discretion" in ruling that the tapes could be generally heard. The affirmance by a Court of Appeals of such an exercise of discretion by a district judge is hardly the type case this Court has indicated should fill its already filled docket. *Moor* v. *Texas & N.O.R.R. Co.*, 297 U.S. 101, 105 (1936).

The second issue petitioner argues is raised by the decision of the Court of Appeals relates to its ruling that court exhibits are generally available for copying, except where "justice so requires". (15a) But this proposition, as the Court of Appeals demonstrated, had long since been established with respect to all public records, including exhibits held in court. The parade of horrors suggested by petition to the Court of Appeals was answered by it with deserved terseness:

"Appellee does point to examples of exhibits, such as pornographic movies and tapes of wire-tapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a power to deny public access in special cases, they do not justify a total ban on inspection." (13a-14a)•

Nor does the single case relied upon by petitioner to support a contrary result aid its position.••

• Of course, insofar as a film is statutorily protected under the copyright laws (17 U.S.C. §§ 1 *et seq.* (1970) *as amended*), no member of the public may copy the material even if it is permitted either to be shown in open court or to be excerpted in the transcripts or opinions arising out of a judicial proceeding. *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F.Supp. 1269, 1271 (S.D.N.Y. 1970). *See also Douglas International Corp.* v. *Baker*, 335 F.Supp. 282, 285 (S.D.N.Y. 1971).

•• The case is *United States* v. *Monjar*, 154 F.2d 954 (3d Cir. 1946) (Bf. p. 16) and petitioner's reliance on it is totally misplaced. The overriding concern of the court in *Monjar* related to

Finally, the suggestion is utterly unpersuasive that the Court should review the holding of the Court of Appeals that the common law right to inspect and copy court exhibits may be overcome by the alleged "risk of causing possible prejudice" at a hypothesized second trial of a convicted felon. The Court's conclusions that the possibility of a new trial is too indefinite a basis to permit such a result,* that the material in this case all consisted of admitted evidence, and that the celebrated and well-counseled defendants had not made such arguments on their own behalf are persuasive and, we submit, controlling.

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questions of comity between the federal and state court systems. More specifically, the Court of Appeals held in *Monjar* that a Pennsylvania district attorney who was seeking various "books, documents and other exhibits" (154 F.2d at 955) obtained by subpoena *duces tecum* and introduced in evidence by the United States in a related federal trial held in the District Court of Delaware should be permitted to do so by proceeding in the state courts under the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." (154 F.2d at 958-59). "Otherwise," the Court reasoned, "the delicate balance which comity has asserted hitherto in the courts of our dual system might be disturbed." (*Id.* at 959). Furthermore, the *Monjar* Court's assertion (made in the context of its discussion of comity) that the Clerk is a "mere custodian" of the exhibits at issue in *Monjar* in no way alters or compromises the well established common-law that "judicial records, of which, by statute and unvarying usage, *the custodian*, upon payment of the fee allowed by law, is bound to furnish copies." *Brewer* v. *Watson*, 71 Ala. 299 (1882), cited in *In re Mosher*, 248 F.2d 956, (C.C.P.A. 1957) (emphasis added).

* As noted by the Court of Appeals in its opinion, the convictions of Messrs. Mitchell, Haldeman and Ehrlichman have been affirmed by it and Mr. Mardian's conviction reversed. (17a, n.41). Mr. Parkinson was acquitted. On January 17, 1977, the Special Prosecutor announced his decision not to retry Mr. Mardian. (*New York Times*, Jan. 18, 1977, p. 12, col. 6). Thus, the only defendant for whom a new trial has been ordered will not, in fact, need to stand trial at all. It is difficult to envisage a better illustration supporting the conclusion of the Court of Appeals that he claims asserted against the rights of the broadcasters and the public were far too speculative to withstand scrutiny.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 5, 1977

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether, in all the circumstances of this case, the Court of Appeals erred in applying the District of Columbia's long-established common law right of public inspection and copying of court records, so as to permit all members of the American public, upon request, to obtain copies of tape recordings admitted into evidence and played to the jury and to members of the public present at the Watergate Cover-Up Trial, *United States v. Mitchell, et al.*

STATEMENT OF THE CASE

The respondents in this Court are Warner Communications, Inc. ("Warner"), a diversified communications company which, among other things, manufactures and distributes documentary and other phonograph records, and four organizations active in broadcasting (CBS, NBC, ABC and the Radio Television News Directors Association, collectively referred to herein as "the broadcasters").

The history of this case up to and including the opinion of the Court of Appeals is adequately set forth in the opinion of that court. Petition for Writ of Certiorari (hereinafter cited as "Petition"), App. A. Subsequently, the Court of Appeals denied Mr. Nixon's Petition for Rehearing and Suggestion for Rehearing en Banc. *Id.*, App. B. On December 9, 1976, Mr. Nixon filed a petition to stay issuance of the Court of Appeals' mandate pending the filing of a petition for a writ of certiorari. The court granted that motion in part, but issued the mandate to the extent of directing the District Court to develop a plan for copying and distributing the tapes. App. 1, *infra*, p. A-1.

On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative procedure for developing the distribution plan. App. 2 *infra*, pp. A-2 to A-5. On January 11, 1976, Warner and the broadcasters filed a memorandum on implementation of Judge Sirica's order, App. 3, *infra*, pp. A-6 to A-13, which will satisfy all criteria set forth in the Court of Appeals opinion governing copying and distribution of the tapes.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals in this case is based upon four totally unexceptionable principles that are unworthy of further review by this Court: (1) There is in the District of Columbia a local common law right to inspect and copy public records, including judicial records, and that right, which is "fundamental to a democratic state," has been settled at least since 1894. Petition, 8a-11a. (2) The common law right to inspect and copy judicial records extends to exhibits. *Id.*, 12a-14a. (3) The right to inspect and copy judicial records is not absolute, and courts will refuse to apply it when "justice so requires", a decision within the "sound discretion" of the courts. *Id.*, 14a-15a.(4) The District Court abused its discretion in the particular circumstances of this case by denying respondents' common law right to inspect and copy evidence introduced in open court. *Id.*, 16a-25a.

The Court of Appeals upheld the common law right asserted by Warner and the broadcasters on behalf not merely of themselves, but also of the general public. In laying down criteria for release of the tapes, the court required that distribution be "on an equal basis to all persons desiring copies." Petition, 25a. Thus, the tapes would *not* be released for any specific purpose, such as "for radio and television broadcast and for sale in the form of phonograph records and tape cassettes," as suggested by Mr. Nixon. *Id.*, 3. Rather, the tapes would be released to interested members of the public for whatever uses they see fit to make of them.

The Court of Appeals did not decide any constitutional or statutory question, and it did not enter into a conflict with the decision of any other court. Nor did it decide any broad common law question. It noted that "[b]ecause no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within

the sound discretion of the courts, subject to appellate review for abuse." *Id.*, 14a. Thus, the court properly declined to consider in the abstract whether particular types of exhibits such as pornographic movies or tapes of wiretapped conversations should be subject to public inspection. In short, the Court of Appeals decision is narrow; it is one step in the gradual development of a body of case law delineating in specific factual contexts the common law right to inspect and copy public records.

Mr. Nixon tenders three issues for plenary review by this Court: (1) whether this Court's opinion in *United States v. Nixon*, 418 U.S. 682 (1974), precludes an exercise of the common law right in this case, Petition, 2-3, 13, 15-16; (2) whether the common law right to inspect and copy does apply to tape recordings and other physical evidence obtained by compulsory process and used as evidence in a federal court trial, *see id.*, 3, 13, 16-19; and (3) whether the Court of Appeals improperly overrode the District Court's determination that the public's enjoyment of its common law right must be delayed indefinitely lest release of the tapes prejudice any possible retrial of defendants in the Watergate conspiracy case, *id.*, at 3, 13, 19-20. None of these issues is worthy of plenary review by this Court.

1. THE DECISION BELOW DOES NOT VIOLATE *UNITED STATES V. NIXON*

The first issue tendered for plenary review by Mr. Nixon is whether the decision below is inconsistent with *United States v. Nixon*, 418 U.S. 682 (1974). There, this Court recognized a constitutionally based presumptive privilege for confidential presidential communications. The Court found that the privilege rests on "the values to which we accord deference for the privacy of all citizens" and "protection of the public interest in candid, objective and even blunt or

harsh opinions in Presidential decision-making." 418 U.S., at 708. In light of those interests, it is clear that the privilege protects the *confidentiality* of presidential conversations, and the theme of confidentiality pervades this Court's opinion in *United States v. Nixon*. However, as the Court of Appeals noted below, "the tapes played at trial are no longer confidential." Petition, 25a. The tapes that Warner and the broadcasters seek to copy have all been played in open court, transcribed, and admitted into evidence at a criminal trial, and their contents have been widely disseminated to the public.[1] Whatever the adverse consequences to the ongoing interests of the United States or to the Presidency from a breach of the confidentiality of these tapes, those consequences have already occurred, and there can be no further interest in the confidentiality of the tapes.[2] If ever there was material as to which there can be no claim of confidentiality or privacy, it is the tapes at issue in this case.

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[1] Mr. Nixon overstates the scope of the opinion below. The subject matter of this case is *not* all of "the subpoenaed materials" at issue in *United States v. Nixon*. Petition, 13. Some of those materials did not survive Judge Sirica's *in camera* inspection, while much of the material finally turned over to the Special Prosecutor was never introduced as evidence at trial. This case concerns only those tapes and portions of tapes which actually became court exhibits and which were actually played during the Cover-Up Trial.

[2] In *United States v. Nixon, supra*, this Court stated that it could not "conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S., at 712. Nor is it credible that advisors will be less candid because of the possibility that tape recordings of their remarks, having been played in open court at a public trial and quoted and described in the press, will also be disseminated by other means. The possibility of additional dissemination cannot have any significant marginal deterrent effect on candid communication by presidential advisors, and thus such incremental dissemination does not threaten any adverse consequences for the values that the presidential privilege is designed to protect.

This Court in *United States v. Nixon* spoke of the "high degree of deference" owed to presidential conversations, 418 U.S., at 715, and the Court clearly required that extraordinary measures be taken to prevent unwarranted incursion on presidential confidentiality. However, the Court's references to "deference" were in the context of a discussion of the "District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications," 418 U.S., at 714, to determine which materials would remain confidential and which would not. As the Court of Appeals noted, the passages in the opinion on which Mr. Nixon relies all referred to the District Court's obligation to ensure the confidentiality of presidential conversations which were either *irrelevant or inadmissible* in the criminal case. Petition, 24a-25a. Once the claimed privilege of confidentiality has been defeated by the needs of justice, and the formerly privileged communications have been admitted into evidence, they should be treated like any other evidence.[3] Nothing in *United States v. Nixon* is to the contrary.

2. TRIAL EXHIBITS ARE JUDICIAL RECORDS

The second question tendered by Mr. Nixon is whether the common law right to copy extends to tapes, films, and similar physical exhibits. There is no reason to believe that requests to copy such materials are so frequent as to justify review by this Court. There is no decision in conflict with that of the Court of Appeals below. Indeed, there is no other

[3]Mr. Nixon incorrectly attributes to the Court of Appeals the holding that the "necessary consequence" of admission of presidential conversations into evidence is that they will be disseminated to private parties. *See* Petition, 13, 15. Rather, as would be the case with respect to any other evidence admitted at a criminal trial, the common law right to inspect and copy such presidential communications in a particular case could be denied if "justice so requires".

federal case in point; consequently, if certiorari were granted, this Court would not have the benefit of prior consideration of the issue by a number of lower courts in varying factual settings. In sum, review by this Court at this stage of the development of the law would be highly premature. Finally, the decision below is plainly correct.

Mr. Nixon's central argument is that trial exhibits are not judicial records. In rejecting that contention, the Court of Appeals pointed out that Rule 10(a) of the Federal Rules of Appellate Procedure provides that "[t]he original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal" (emphasis supplied). *Id.*, 12a. The court found further support for this holding in *Manual for the Clerks of the United States District Courts*, prepared under statutory authority by the Judicial Conference of the United States, which classifies exhibits as "auxiliary case records" and which requires that documentary exhibits in cases of historical significance be retained permanently in the case file. *Id.*, 12a & nn. 26, 28. Moreover, logic and experience support the court's conclusion, since "[d]enying public access to real and documentary evidence would be inconsistent both with the common law's attempt to provide the public with complete information and with what Judge Gesell found to be the district court's practice of providing copies of documentary and photographic exhibits on request." *Id.*, 13a.[4] Thus, as

[4]Judge Gesell specifically found that the common law right to inspect and copy *all* court records extends to exhibits in the custody of the Clerk:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may

Judge Gesell had noted, "there is congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels." *Id.*, 40a.

There is no reason in principle to distinguish between what Mr. Nixon calls "physical" exhibits and "documentary" exhibits. Tapes and films are normally, as in the instant case, introduced for their content rather than for the physical qualities of the materials out of which they are made. They are testimonial rather than physical evidence. In this respect they are indistinguishable from writings, and quite distinguishable from bloody shirts. *If* any distinction is to be drawn between physical and documentary exhibits, tapes ought to be classed as documents. But as Judge Gesell observed, "the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." Petition, 41a.

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be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (1894). *See also, United States v. Burka*, 289 A.2d 376 (1972); *Belt v. Pr. George's County Abstract Co.*, 73 Md. 289, 20 A. 982 (1890).

"The Court stated in *Drawbaugh*,

. . . any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice." Petition, 38a-39a (emphasis in original). *See also id.*, 39a–41a.

Although Mr. Nixon objects to the "indignity" of distribution of recorded words, that indignity is no greater than the embarrassment that may result from public reporting of unseemly facts revealed by courtroom testimony or in written exhibits. Mr. Nixon apparently does not object to a common law right to copy a transcript of testimony or written exhibits. Moreover, the Court of Appeals left ample discretion in trial courts to deny public access to copies in order to prevent embarrassment: "But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct." Petition, 22a (emphasis in original).[5]

Finally, though Mr. Nixon can find no "apparent" distinction between the tapes of his conversations and "tapes of wiretapped conversations and pornographic film exhibits," *id.*, 17, the distinctions are obvious. As the Court of Appeals made clear, copying may be prohibited where "justice so requires." That phrase is simply a semantic variant of the standard of "sound discretion" or "abuse of discretion." *Id.*, 14a; *see id.*, 17a, 21a, 24a, 25a. Any application to copy

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[5] Thus, Mr. Nixon grossly mischaracterizes the court's opinion when he labels it a "precedent which puts in serious doubt the power of a district court to control the uses to which its own process is put and to protect the rights of parties and witnesses in the criminal justice system." Petition, 15. On the contrary, under the opinion District Courts retain full power and discretion to protect all the rights of parties, witnesses and the public, as justice requires.

wiretapped conversations would have to be decided in the light of 18 U.S.C. § 2510 *et seq.*, as well as the trial judge's good sense. Similarly, an application to copy a pornographic film would raise questions concerning the lawfulness of possession of such material and concerning copyright and other property rights. In the instant case, Mr. Nixon has not asserted at any time any copyright or other proprietary interest in the tapes at issue. Therefore, the question whether trial exhibits are "private property" and hence immune from copying under the common law right is not presented by this case.[6]

3. RELEASE OF THE TAPES WILL NOT CAUSE UNDUE "PRETRIAL" PUBLICITY

The third issue Mr. Nixon tenders for review is whether the release of the tapes will create undue pretrial publicity in the event of a retrial of any of the defendants in the Watergate Cover-up Trial. However, the record in this case does not present that issue.

None of the Watergate defendants themselves seeks review by this Court of that issue. None of them raised the issue in the District Court. Only Mr. Haldeman raised it in the Court of Appeals–and he did so in a *pro forma* one-sentence statement. Petition, 20a, n.47. Mr. Nixon, who is not a party to the criminal case, has no standing to raise the issue of prejudicial pretrial publicity. He admits that he has "no direct

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[6]The master set of tapes (from which all subsequent copies would be made) would be prepared by copying from the Special Prosecutor's copy of the White House tapes. The original White House tapes and the copy in the court record would not be touched. *See* App. 3, *infra*; Petition, 5a.

interest in the criminal case," *id.* 9, n.3, and this case has none of the features that justify the assertion by one party of the rights of others. *See, e.g., Singleton v. Wulff*, 44 U.S.L.W. 5213, 5215-16 (1976); *id.*, at 5218-19 (Powell, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ., concurring in part and dissenting in part); *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

Moreover, the possibilities of prejudice are, as the Court of Appeals noted, exceedingly remote. The Court of Appeals has affirmed the convictions of three of the four convicted *Mitchell* defendants, and those convictions are thus presumptively valid. In the case of defendant Mardian, whose conviction was reversed, the Government has decided not to proceed further.[7] Therefore, there are no retrials in prospect. As the Court of Appeals noted, "the very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling." Petition, 17a.

The Court of Appeals also pointed out that the materials at issue are not "an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury. Rather, [respondents] seek tape recordings from which inadmissible statements have been carefully eliminated. These tapes were played to the jury, and presumably will be replayed at any retrial. The transcripts of these conversations have received wide circulation and have been reenacted in various forums." *Id.*, 18a-19a.

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[7]*See* Government's Motion to Dismiss Indictment, *United States v. Mardian*, Cr. No. 74-110 (D.D.C. January 17, 1977).

Finally, as the Court of Appeals concluded, "[i]f the chance of a retrial justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted." *Id.*, 17a-18a.

CONCLUSION

The Court of Appeals' decision was a narrow one; it arose out of a particular factual setting not likely to be repeated, and it was reached under well-established principles of local common law. The case does not warrant review by this Court.

None of the issues presented in No. 75-1605 in this Court, *Nixon v. Administrator of General Services,* prob. juris. noted, Nov. 29, 1976, is relevant to the instant case. That case involves the constitutionality of an Act of Congress, and an assertion of proprietary rights by Mr. Nixon. Neither point is involved in the instant case. This Court's evaluation of the Court of Appeals' opinion in the instant case will not be aided by this Court's decision in No. 75-1605, whatever it may be. Therefore, Warner respectfully submits that there is no reason to hold this case for No. 75-1605.

The Court of Appeals recognized that the public interest served by the common law right to inspect and copy court records is closely related to the interests served by the First, Fifth and Sixth Amendments. Petition, 10a-11a. In the instant case, the public interest in prompt vindication of the common law right is particularly compelling since the tapes at issue reveal abuse of public office by some of the Nation's highest officials during Mr. Nixon's tenure as President. The record amply shows that the aural qualities of the cover-up conversations, which are captured only on the tapes, are crucial facts for a full understanding of the cover-up and the ensuing trial in *United States v. Mitchell. E.g.*, Court of Appeals Joint Appendix 92-118; Petition, 2a. This Court has long recognized that the interest in "an informed and enlightened public opinion" requires the prompt release of such information. *E.g., Bridges v. California,* 314 U.S. 252, 268-69 (1941); *International News Service* v. *Associated Press,*

248 U.S. 215, 235 (1918); *Nebraska Press Ass'n v. Stuart*, 44 U.S.L.W. 5149, 5156 (1976); *id.*, at 5170 (Brennan, J., joined by Stewart & Marshall, JJ., concurring). And yet more than two years have already elapsed since Warner and the broadcasters first sought vindication of the common law right of the public to inspect and copy these tapes. Each additional day of delay is a further erosion of the very right sought to be vindicated.

For the foregoing reasons, the petition for certiorari should be promptly denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409 September Term, 19 76
Miscellaneous No. 74-128

United States of America

v.

John Mitchell, et al.

In Re: National Broadcasting Company, Inc., et al.,
Appellants

United States Court of Appeals
for the District of Columbia Circuit
FILED DEC 10 1976
GEORGE A. FISHER
CLERK

No. 75-1410 Miscellaneous No. 74-128

United States of America

v.

John Mitchell, et al.

Warner Communications, Inc.,
Appellants

Before: Bazelon, Chief Judge; MacKinnon, Circuit Judge and Merhige*, United States District Judge for the Eastern District of Virginia

ORDER

On consideration of the motion of respondent Nixon for stay of mandate, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a period of 30 days from the date of this order, and, it is

FURTHER ORDERED by the Court that during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution, in accord with this Court's opinion of October 26, 1976.

Per Curiam

Circuit Judge MacKinnon would not remand the record

*Sitting by designation pursuant to Title 28 U.S.C. § 292(d).

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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, et al.

IN RE: NATIONAL BROADCASTING CO., et al.

(filed Dec. 22, 1976)

MEMORANDUM AND ORDER

On December 10, 1976, the Court of Appeals remanded the record in this case to this Court for the "limited purpose of commencing the development of a plan of distribution [of copies of the tapes introduced into evidence and played to the jury in United States v. Mitchell, Cr. No. 74-110], in accord with [the Court of Appeals' earlier opinion of October 26, 1976." This order is intended to begin that process.

I.

The first thing that must be done is to set a procedure for developing the plan. The Court has tentatively decided to proceed in the following manner. First, it will request that the parties in this case who are seeking copies of the tapes submit a proposed plan or plans for distribution. The Court will then

allow comment on the proposed plan or plans by those parties in this case who wish to do so. Thereafter, the general public will be given an opportunity to comment on a plan or plans that might be acceptable. When all the comments from the public have been received and considered, the Court will then decide on the final plan for distribution.

The Court is aware that this possible procedure is somewhat vague and may not be completely satisfactory. The Court, therefore, would like to have comments on it from the parties. In particular, if comment by the public is in fact appropriate, the Court would like to have suggestions on how they might best be notified and given an opportunity to comment. For example, the Court would like to know whether notice through the *Federal Register* or through press release or through both would be appropriate.

II.

In any event, it appears at this time to be safe—and in the interest of speeding matters up—also to ask the parties seeking copies of the tapes to begin the process by submitting a proposed plan or plans for the tapes' distribution. Of course, there may be many other matters worth discussing, but of particular concern to the Court at this time are the following:

A. PRODUCTION OF COPIES

How can the Court assure that copies of high quality will be produced relatively quickly, at a reasonable cost, and in sufficient quantity to satisfy the likely demand for them? How can the Court assure that no unfair competitive advantage is conferred through the copying process? More specifically, who should be entrusted with the task of producing the copies? What form should the copies take—phonograph record or tape?

One possible solution to at least some of these problems might be to ask the archivist of the United States to undertake this task. It does appear that 31 U.S.C. § 686 (1970) permits the Court and the archivist to enter into an agreement to do this, and it does appear, from the Court's preliminary inquiry, that the archivist has the capability to perform the work. There may be a better way that the Court is not aware of, but the parties should specifically consider this possibility and, if unsatisfied with it, give reasons against it.

B. DISTRIBUTION OF COPIES

How can the Court assure that the copies will be distributed fairly, promptly, and at reasonable cost? How can the Court assure that no unfair competitive advantage will be conferred through the distribution process? More specifically, who should be chosen to distribute the copies? How can the Court assure that each person who wishes to purchase a copy will be able to do so at approximately the same time? How shall interested persons be notified that copies of the tapes are available? What should be the price set for purchase of copies?

The Court suggests that perhaps the archivist might undertake this task also. The parties should specifically address this possibility.

III.

Accordingly, in order to begin consideration of these matters, it is this 22nd day of December, 1976,

ORDERED that petitioners National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS, Inc., Radio Television News Directors Association, and Warner Communications, Inc., have twenty days in which to make such comment on the procedures for developing a final plan for distribution as they deem appropriate, and to submit a proposed plan or plans to the Court; and it is

FURTHER ORDERED that Mr. Richard Nixon, the Special Prosecutor, the defendants in *United States v. Mitchell*, Cr. No. 74-110, and the other parties in this case, have ten days thereafter in which to submit their comments on the procedures suggested for developing a final plan; and it is

FURTHER ORDERED that all of the parties in this case shall have this same additional ten days in which to submit comments on any plans for distribution that they have not proposed.

/s/ JOHN J. SIRICA
United States District Judge

APPENDIX 3

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN D. MITCHELL, *ET AL.*

IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; PUBLIC BROADCASTING SERVICE; and WARNER COMMUNICATIONS, INC.

MEMORANDUM OF APPLICANTS, NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, PUBLIC BROADCASTING SERVICE, AND WARNER COMMUNICATIONS, INC., ON IMPLEMENTATION OF THE COURT'S MEMORANDUM AND ORDER OF DECEMBER 22, 1976

This memorandum is submitted on behalf of all applicants before the Court in response to the Court's

Memorandum and Order of December 22, 1976. It sets forth the views of the applicants as to how copies of the tapes introduced in evidence and played to the jury in *United States v. Mitchell* should be prepared and distributed to the public.

The core conclusion of the memorandum is that the National Archives and Records Service is ready, willing and able to undertake all the tasks required to prepare a master tape and distribute copies to the public, and that the Court should enter an order permitting it to do so as promptly as is legally possible.

I.

At the outset, applicants express their agreement with the Court's view that the applicants should first submit their suggestions–by this memorandum–as to the preparation and distribution of the tapes; that all other parties to the action should then be given the opportunity to comment on those views; that the general public should then be permitted to express its views to the Court; and that the Court should then determine the final plan for distribution.

In aid of that procedure, the General Services Administration ("GSA") has advised the applicants that it is prepared to print in the *Federal Register*, at the request of the Court, the complete text of this proposal, together with instructions to members of the general public as to how they may submit comments to the Court. The applicants believe that by this means, and any press release with respect thereto that the Court may deem appropriate, the public can be fully informed of this proposal, and the Court can gain the benefits of public participation in the development of a final plan for distribution of the tapes.

II.

A. PREPARATION OF A MASTER TAPE.

The applicants have conferred with the Archivist of the United States, Dr. James B. Rhoads and the Deputy Archivist, Dr. James E. O'Neill, with respect to the willingness and ability of the National Archives and Records Service ("National Archives") to prepare a "master tape" which would include the sections of tapes introduced in evidence in the *Mitchell* trial. The Archivist has advised us that the National Archives is willing and able to assume the responsibility for preparing such a tape. The procedure to be followed would be as follows:

1. The master tape would be made by dubbing (copying) either the Court's copy of the tapes (Copy A) or the Special Prosecutor's copy (Copy B). The Special Prosecutor is willing to make available the copy in his custody in accordance with a plan adopted by the Court. The applicants have been advised by the National Archives that Mr. Robert Halvorson, a consultant to the Special Prosecutor's office during the *Mitchell* trial with respect to the playing of the tapes in court, is now a consultant to the National Archives and would be available to supervise the dubbing of the tapes. Mr. Halvorson is closely familiar with the tapes themselves and would be responsible for ensuring that only those portions of Copy A or B that were played to the jury would appear on the master tape. Mr. Halvorson would be advised by another audio engineer acceptable to the National Archives.

2. The dubbing would be carried out in the National Archives building itself. The National Archives is prepared to take all necessary steps to ensure the security and integrity of all tapes entrusted to it or produced by it.

3. The master reels would be a series of 30-minute seven-inch reels played at a speed of 7.5 inches per second (IPS), monaural, and using standard NAB equalization. We propose the speed of 7.5 IPS because tapes of speech are normally played by the broadcast media at that speed. The tapes were played to the jury at a speed of 3.75 IPS. However, during the dubbing, the machine playing the original could be run at 3.75 IPS, and the copying machine could be run at 7.5. The difference in speed would not present any risk to the original tape. The highest quality audio equipment would be used in the preparation of the master tape.

4. The segments of conversation would be copied in chronological order rather than in the order in which they were played to the jury. The master reel may include some identification of each segment of conversation, by reference to date, time, location and/or participants, and/or to the transcript page. This proposal would not complicate or delay the dubbing process.

5. We have no entirely reliable figure for the number of reels needed for the master set. Our best estimate is that approximately 40 will be required (based on an estimated playing time of 18- 22 hours)

B. PREPARATION AND DISTRIBUTION OF COPIES.

After the master tape has been made, copies would be prepared for distribution to all members of the public who wish to purchase them. The applicants have conferred with John H. McLean, the Director of the National Audio Visual Center ("Center"), a Division of the National Archives. The Center is experienced in the preparation and distribution of audio and visual materials on behalf of the United States Government and has an existing organization and procedures

for carrying out that function. Mr. McLean has advised the applicants that the Center is willing and able to make copies of the master tape and to distribute them to the public on the following basis:

1. After the master tape has been made, the Center would prepare copies of the master tape for distribution to the public.

2. Mr. McLean estimates that the Center can make and distribute the tapes to the public for a total price of $3.75 to $4.00 per one-hour cassette reel, at 1.875 IPS, or $5.00 to $5.75 per one-hour tape reel, at 3.75 IPS. Included in those prices are complete transcripts of the tapes, packaging and mailing. The Center would distribute to the public individual cassette or tape reels, combinations thereof, or entire sets, in accordance with specific orders from customers. The Center will also accept orders for tapes for playback at 7.5 IPS; these would be available for $5.00 to $5.75 per 30-minute reel in complete sets only.

3. The public would be informed of the availability of the tapes and the method of ordering them through publication in the *Federal Register* of a notice setting forth the relevant details. The National Archives would also issue a press release and would engage in its usual advertising with respect to the availability of the tapes for purchasing.

4. The Center would contract out the actual preparation of copies from the master tape. The contracting entity would be one with whom the Center has dealt in the past, and one in whose competence, integrity and general reliability the Center has complete confidence. All necessary steps would be taken to ensure the security and integrity of all materials handled by the contracting entity.

5. The Center would supply the public with copies of the tapes on individual orders, and would continue to have copies made so long as orders were received. The distribution process would commence with the publication in the *Federal Register* of the notice referred to in paragraph 3 above. All members of the public who submitted orders to the Center within 21 days of publication of the notice would receive copies of the tapes on the same day. Copies would be picked up by those members of the public who wished to do so personally, or would be mailed (at the Center's expense).

III.

The National Archives is prepared to enter into a memorandum of agreement with the Court pursuant to which the Court would effect the transfer of Copy A or Copy B to the National Archives, and the National Archives would agree to prepare the master tape and (through the Center) to carry out the distribution process set forth herein.

IV.

In its statement to counsel prior to the issuance of its December 22, 1976 Order, the Court indicated that after all responses had been received with respect to the development of a plan of distribution of the tapes to the public, the Court would set the matter down for a hearing at the earliest opportunity. The applicants have been advised that appropriate representatives of the National Archives and the Center are prepared to appear and testify in detail with respect to the proposal set forth herein.

CONCLUSION

Applicants submit that the foregoing plan meets all appropriate requirements for distribution of the Watergate Cover-Up Trial tapes to the public. The National Archives would assume responsibility for the entire process. No administrative burden would be imposed on the Court. The master tape would be prepared under the auspices of responsible, experienced public officials in a secure location. The preparation and distribution of copies would be carried out by a government agency experienced in such matters. All members of the public would have an equal opportunity to participate in a prompt initial distribution of tapes on a single day. Thereafter, tapes would continue to be available to members of the public on a first-come-first-served basis. Members of the public could purchase, at a low cost, entire sets of tapes or any lesser combination of tapes they desired.

Every stage of the preparation and distribution of tapes would be carried out by the National Archives, or under its close supervision. Therefore, the Court would be assured that there would be adequate security; no undue commercialization and no unfair advantage or disadvantage to anyone.

Applicants respectfully urge the Court to adopt the foregoing plan; they are prepared to submit an appropriate order and, after further consultation with the National Archives, a proposed memorandum of agreement.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In their opposition to our petition for writ of certiorari, respondents urge the Court to deny the petition on the ground that this case is "unique." Respondent Warner Communications, Inc. asserts that this case "arose out of a particular factual setting not likely to be repeated." Brief of Respondent Warner Communications, Inc. in Opposition, at 13. Respondents National Broadcasting Inc., et al. described the case as "one arising out of a singularly unique fact situation, one unlikely to recur in the history of the republic." Brief of Respondent National Broadcasting, Inc., et al. in Opposition, at 9.

This is to inform the Court that on January 28, 1977, the United States Court of Appeals for the District of

Columbia Circuit affirmed in part a lower court order directing that certain tape recorded conversations of the Nixon administration be provided in response to a subpoena *duces tecum*. See *Dellums v. Powell*, No. 76-1336 (D.C. Cir., Jan. 28, 1977). In *Dellums*, a civil class action, plaintiffs seek damages for alleged violation of their constitutional rights during the "May Day" demonstrations on May 5, 1971. The appellate court, affirming the decision of the district court, held that the *Dellums* plaintiffs are entitled, notwithstanding the presidential privilege of confidentiality, to discovery of the relevant portions of all White House tape recorded conversations over a period of twenty-five (25) days in 1971.

Petitioner submits that the *Dellums* case is a perfect example of the inevitable recurrence of the issue presented in the instant case, and that respondents' assertions of uniqueness are ill-founded.

Respectfully submitted,

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and judgment of the court of appeals (Pet. App. 1a-27a)[1] is not yet reported. The Memorandum Opinion and Order of the district court from which appeal was taken (Pet. App. 29a-35a) is reported at 397 F.Supp. 186. Two earlier memorandum opinions on the

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case. "App." refers to the Appendix filed with this Brief.

same application by a different district judge (Pet. App. 36a-45a) are reported at 386 F.Supp. 639.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1976 (Pet. App. 1a-27a). A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on December 3, 1976 (Pet. App. 28a). The petition for certiorari was filed within 90 days of that date, on January 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether tape recordings of conversations between a President of the United States and his closest aides, produced over a claim of presidential privilege in order to meet "the fundamental demands of due process of law in the fair administration of criminal justice" and thereafter played in open court as evidence in a criminal trial, must be supplied by the court to private parties for radio and television broadcast and for sale in the form of phonograph records and tape cassettes.

STATEMENT

A. The Production and Use at Trial of the Subpoenaed Tape Recordings

On April 18, 1974, the Watergate Special Prosecutor issued a subpoena *duces tecum* to President Richard Nixon requiring the production of tape recordings of a number of confidential conversations between the President and his aides. Mr. Nixon moved to quash the subpoena on various grounds including executive privilege, but the motion was denied by the district court. The

district court ordered the tapes produced for *in camera* inspection to determine which portions, if any, would be released to the Special Prosecutor for use at trial. This Court granted the Special Prosecutor's petition for certiorari before judgment in the court of appeals and affirmed the district court's order requiring the production of the tapes for *in camera* review. *United States v. Nixon*, 418 U.S. 683 (1974). The Court held that the recordings were "presumptively privileged," but that the privilege was overridden under the circumstances by the "demonstrated, specific need for evidence in a pending criminal trial" and the "fundamental demands of due process of law in the fair administration of criminal justice." 418 U.S. at 713.

In compliance with the district court's order, Mr. Nixon produced the requested recordings in July and August of 1974.[2] Judge Sirica then examined each of the recordings and transmitted to the Special Prosecutor those portions he deemed relevant and admissible in evidence.

During the Watergate conspiracy trial, *United States v. Mitchell, et al.*, Cr. No. 74-110 (D.D.C.), selected portions of the subpoenaed tapes were admitted into evidence and played to the jury. A total of some twenty-two hours of conversations were played in the course of the thirteen-week trial. Each time the tapes were played in the courtroom, the jurors and the members of the press and public in attendance were provided with headphones, enabling them to hear the evidence as accurately and conveniently as possible. In addition, printed transcripts of each conversation were

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[2]Certain other recordings had been produced under similar circumstances in November 1973 following the decision of the court of appeals in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

distributed to all those present. No restrictions were placed on the subsequent use of the transcripts or on press reports concerning the recordings played in open court. As a result, the contents of the conversations played to the jury were reported daily in every news medium, and transcripts of the tapes were published in newspapers as well as in book form.

B. The Applications for Copies of the Taped Conversations

Shortly before the trial began, several television news commentators asked Judge Sirica to provide them with copies of the tapes at the time they were played at trial. In a letter dated October 2, 1974 (App. 9-11), Judge Sirica denied the request, citing an attached memorandum of the Chief Judge of the District Court, which reflected the views of the district court judges he had consulted on the matter. The memorandum stated that it was the unanimous view of the judges that: (1) the decision whether to make the tapes available should be left to the trial judge; (2) broadcasting of court proceedings is improper, and making available a tape recording that was played in court is difficult to distinguish from letting a reporter use a tape recorder to record the entire proceeding; and (3) providing verbatim transcripts to the press "would appear to constitute more than adequate disclosure to the public of what the tapes contained."

On November 12, while the trial was still in progress, the three respondent broadcasting companies and respondent Radio-Television News Directors Association filed a joint application before Judge Sirica claiming a right under the First and Sixth Amendments to obtain copies of the tapes being played at trial (App. 12-17). The next day, respondent Public Broadcasting System

joined that application (App. 18-21). Because he was still occupied with the trial, Judge Sirica referred the application to Chief Judge Hart, who in turn referred it to Judge Gesell to consider and report on at an Executive Session of the District Court (App. 17-18). Judge Sirica subsequently entered an order directing the Clerk to assign the application to the miscellaneous civil docket and inviting any persons served with the application to file notice of their positions with respect to the matter (App. 22).

In response, Mr. Nixon filed an opposition to the application (App. 30-39) arguing that (1) the applicants had no right, constitutional or otherwise, to obtain a copy of the actual tape recordings played in evidence; (2) the court had no authority, merely because portions of the tapes had been played in court, to make copies of the subpoenaed recordings available to the public; and (3) public release of the recordings themselves would be contrary to the policies recognized in *United States v. Nixon, supra*, and would intrude upon the privacy of the participants in the conversations. None of the other persons served with the application filed oppositions in the district court, although the Special Prosecutor filed a two-page statement expressing the Government's view of the matter (App. 27-28). The Special Prosecutor stated that while the applicants' claim of a constitutional right to duplicate the recordings was "debatable," the question was one "peculiarly within the discretion of the Court." Because he did not foresee that the rights of the parties to a fair trial would be jeopardized if the application were granted, the Special Prosecutor did not take a position opposing the application. He did state, however, that any order granting the application should provide that the duplication process not "interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced into evidence."

C. Judge Gesell's Rulings

On November 19, Judge Gesell directed Mr. James F. Davey, the Clerk of the District Court, to prepare an affidavit detailing the mechanical procedures that had been used to reproduce and play the tapes in court, and outlining the factors bearing on the feasibility of further reproduction of those portions of the tapes that had been played to the jury. In his affidavit (App. 23-27), Mr. Davey explained that the conversations played during the trial were contained on some fifty separate tape reels, which had been reproduced from the original tapes after Judge Sirica had excerpted irrelevant or privileged conversations. Only portions of these reels were played to the jury; the parts not played remain confidential. Mr. Davey estimated that to produce a tape recording containing only those portions of the conversations introduced as evidence would require five to seven days' work by a sound recording technician and the participation of someone sufficiently familiar with the tapes to locate and identify the portions that were played in court.

On December 2, respondent Warner Communications, Inc. ("Warner") filed a separate application to copy the tapes, stating its intention to disseminate the conversations to the general public in the form of phonograph records and tape reproductions (App. 39-46). A newspaper account published shortly afterwards reported that Warner planned to produce boxed albums of the presidential conversations and to market a set of selections from the tapes with commentary from George C. Scott, a well-known movie actor (Washington Post, Dec. 26, 1974, at B-1).

Three days later, on December 5, 1974, Judge Gesell entered a Memorandum and Order with respect to the

pending applications (Pet. App. 36a-43a). Judge Gesell found the applicants' claim of a First Amendment right to copy the tapes to be "wholly without merit," noting that the press enjoys no constitutionally guaranteed "right of access" superior to that afforded to the general public and that the press had been permitted to report everything that transpired in the courtroom (Pet. App. 37a). Judge Gesell also held that Mr. Nixon had standing to protest the release of the tapes. On the merits, however, he rejected Mr. Nixon's arguments in opposition to the applications on the ground that the conversations in question had become "public property" (Pet. App. 41a). Accordingly, Judge Gesell stated that the applicants were entitled to copies of the portions of the tapes in issue "if a satisfactory mechanism and procedure can be evolved" for reproducing and distributing them (Pet. App. 43a). The terms of release, the court stated, would have to ensure against "overcommercialization of the evidence" and would have to permit the court to prepare only a single copy of the tapes as played "and then place its subsequent reproduction and distribution in the responsible hands of an organization, agency, or person which, without profit, can, for a defined limited period, assure fair and equitable distribution to all categories of applicants." The court then invited suggestions for appropriate methods of dissemination "[w]ithout in any way indicating whether it is practical or possible" to release copies of the tapes (Pet. App. 42a-43a).

The respondents subsequently filed a memorandum "on implementation of the Court's memorandum and order" (App. 47-55), in which they set forth a proposal for copying the tapes and disseminating the copies in a manner suited to their purposes. Judge Gesell, however, rejected their proposal on the grounds that the respondents' plan had made no provision to minimize commer

cialization or undignified use of the tapes, and that the plan had not provided for a responsible agency or person to administer the copying and distribution process. Accordingly, on January 8, 1975, he denied all the pending applications without prejudice (Pet. App. 44a-45a). Since the Watergate trial had by then been completed, Judge Gesell transferred the matter back to Judge Sirica "for any further action that may be appropriate in the premises at some later date." No appeal was taken from that order.

D. Judge Sirica's Decision

At a status conference held some three months later, Judge Sirica sought the views of counsel as to whether further action on the applications should be postponed pending the disposition of the appeals in *United States v. Mitchell, et al.* The parties submitted memoranda on the question, and on April 4, 1975 Judge Sirica entered a Memorandum Opinion and Order holding that further action on the matter should await the conclusion of the appeals in the criminal case (Pet. App. 29a-35a). The sole question addressed by Judge Sirica, as he noted at the outset, was "the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110" (Pet. App. 29a).

In his memorandum opinion, Judge Sirica observed that, as Judge Gesell had stated previously, there were "several obstacles which must be overcome before the tapes might be released." Judge Sirica wrote that he was "well aware of the many problems that must be resolved before any Presidential tapes might be reproduced and distributed to the public at large," and he added that for the present he was "seriously concerned about the timing of any release or reproduction of the tapes" (Pet. App. 29a-30a). He then concluded that for several reasons the

tapes should not be reproduced for immediate release. First, all four convicted defendants had filed notices of appeal, and should one or more of them prevail, a new jury would have to be empaneled and the case retried. In view of that possibility, Judge Sirica wrote, "the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence" (Pet. App. 30a). Second, Judge Sirica took note of this Court's admonition in *United States v. Nixon, supra,* that the District Judge should "at all times" accord to presidential records "that high degree of deference suggested in *United States v. Burr.*" The applicants' request for immediate access to the tapes, he wrote, must be viewed "in the light of this solemn responsibility as well as a concern for the rights of the defendants" (Pet. App. 31a). Noting Mr. Nixon's argument that the commercial distribution of the tapes, with possible commentary by journalists or entertainers, would involve "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales," the court concluded that the rights of the Watergate defendants "and many others" might be seriously and permanently damaged if he ordered the immediate release of the tapes (Pet. App. 31a).

The interests advanced by the applicants in favor of immediate release, Judge Sirica stated, were not compelling. Since transcripts of the tapes were freely available at trial, and since no restraints had at any time been placed on reporting what occurred in the courtroom, Judge Sirica concluded that "the argument that the public's 'right to know' presents a compelling reason for granting immediate access to the tapes must be rejected" (Pet. App. 32a).

For these reasons, the district court denied without prejudice the applications for immediate production of copies of the taped conversations. The respondents appealed.

E. The Decision of the Court of Appeals

The court of appeals reversed Judge Sirica by a two-to-one vote, with Judge MacKinnon dissenting (Pet. App. 1a-27a). The court did not base its decision on the constitutional claims asserted by the respondents, but instead held that there exists a "common law right to inspect and copy judicial records," which "extends to exhibits," regardless of their nature (Pet. App. 14a).[3] Exceptions to this common-law right might be devised, the court stated, but only where "justice so requires" (Pet. App. 15a). Accordingly, the court held that the question the district court should have addressed was "whether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records." Once the question is recast in these terms, the court concluded, "the answer becomes inescapable" (Pet. App. 17a).

The court of appeals first addressed the finding by Judge Sirica that putting the tapes in the hands of broadcasters and record companies might seriously and permanently damage the rights of the criminal defendants in the event a retrial became necessary. The court found unimpressive Judge Sirica's concern about the potential for prejudice

[3]The court of appeals based its conclusion at least in part on its view that court exhibits may be retained indefinitely by the court, and that when they are returned to their owners, it is only "because it is impractical to retain the exhibits in the courthouse" (Pet. App. 13a).

because (1) retrials were "only a possibility"; (2) the court of appeals thought it questionable whether listening to the tapes prior to a retrial would make potential jurors less capable of rendering a fair verdict; and (3) the criminal defendants had not objected, in the district court, to the respondents' applications (Pet. App. 17a-20a). On the last point, the court noted that defendant Haldeman had filed a brief statement in the court of appeals opposing distribution of the tapes on the ground that the resulting publicity would jeopardize his rights upon any retrial (App. 99), but the court found that Mr. Haldeman's statement "hardly warrants careful attention" (Pet. App. 20a n.47). The court also acknowledged that the Special Prosecutor had filed a memorandum on appeal (App. 100-101) stating that he was "unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial."[4] In light of the fact that the Special Prosecutor had not formally opposed the applications, however, the court concluded that his statement "does not disturb our basic conclusion."[5]

[4]The Special Prosecutor's statement on appeal was even more equivocal than his statement in the district court, where he had said that he did not foresee "that the rights of the defendants or of the United States to a fair trial would be jeopardized if the [application] is granted" (App. 28-29).

[5]The court also noted that by the time of its decision, the appeals of the Watergate defendants had been decided by the court of appeals, three of the convictions being affirmed and one reversed. The fact that one of the convictions was reversed apparently made a retrial more than "only a possibility." That, however, did not alter the court's conclusion that Judge Sirica's concern about possible prejudicial pretrial publicity did not justify his temporary postponement of any release of the taped conversations (Pet. App. 17a-18a n.41).

The court of appeals then turned to the question whether "concern for the privacy of the persons whose conversations were taped" or "deference owed to presidential records" could justify the district court's decision (Pet. App. 20a-21a). The court observed that while Judge Sirica had referred to these issues, he had not directly based his decision on them. In the court's view, Judge Sirica did not rely on the petitioner's arguments on these points "presumably because Judge Gesell earlier had ruled that they did *not* justify denying access to the tapes (Pet. App. 21a). Since the court of appeals viewed Judge Gesell's decision as "the law of the case," it concluded that the only issue before Judge Sirica was the timing of the release of the tapes, and the only remaining question on appeal was "whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes."[6] (Pet. App. 21a).

On the issues it deemed Judge Gesell to have resolved, the court of appeals held that he had not abused his discretion. The court first rejected Mr. Nixon's claim that he should not be subjected to the mass merchandising and sale of his words spoken in confidence. The court stated that "neither courts nor legislatures have felt this interest worthy of protection," and further observed that

[6] In characterizing the "narrow issue" presented on appeal, the court of appeals misconstrued Judge Sirica's ruling. In his April 4, 1975 opinion, Judge Sirica addressed only the narrow issue of the propriety of immediate release of the tapes, but he plainly did not regard as settled the question whether the tapes must ultimately be released. The opinion referred to the release, "*if ever*," of the recordings, and postponed consideration of the "*possible*" release of the tapes until the appeals in the Watergate case were decided. Judge Sirica thus had no reason to decide what he plainly regarded as serious issues still remaining to be resolved in the case.

the tapes do not contain "bedroom or other intimate conversations," but rather discussions "between business associates" (Pet. App. 22a).

As to the admonition of this Court, referred to by Judge Sirica, that the district court must "accord to presidential records that high degree of deference suggested in *United States v. Burr*," the court of appeals held that such deference was required only in safeguarding the confidentiality of the records, not in their treatment after they are once disclosed in some form. The contention that mass distribution and marketing of the tapes would offend the respect owed by the court to the office of the President was, the court believed, merely "a question of taste" offering "a singularly weak basis" on which to reject the applications (Pet. App. 25a). Furthermore, the court added, these considerations have less weight because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry into the public domain" [7] (Pet. App. 23a).

The court thus reversed Judge Sirica's order and remanded for development of a "plan for release" of the recordings embodying the principles outlined earlier by Judge Gesell. On motion of the petitioner, the court stayed its mandate pending a petition for certiorari but remanded the record for the District Court to develop a plan for reproduction and distribution of the tapes.[8]

[7] The constitutionality of this Act, and thus the validity of the court of appeals' reasoning in this regard, is presently before this Court in *Nixon v. Administrator of General Services*, No. 75-1605 (argued April 20, 1977). Even if the Act is upheld, it is far from clear that the Presidential conversations will ever be disseminated to the general public.

[8] On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative "procedure for developing the plan" for copying and distributing the tapes.

In dissent, Judge MacKinnon noted that "[a]ccess to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony," for "[P]hysical exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished" (Pet. App. 26a). He would have affirmed the district court's determination to withhold any action until all appellate remedies and necessary retrials were concluded, for "[a] significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains" (Pet. App. 27a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals in this case held that recordings of confidential conversations of a President, produced under subpoena for use as evidence at a criminal trial, must be made available to private parties to be broadcast on television and radio, to be marketed in the form of phonograph records and tape cassettes, and to be exploited in any other fashion that the recipients may devise. To reach this surprising conclusion, the court relied on an extraordinarily broad construction of the public's right to inspect court records. That general common-law right, however, cannot be stretched so far. On the contrary, we submit that a federal court has no authority—under the common law, the Constitution, or otherwise—to provide copies of subpoenaed materials to the public on demand, and that such action is particularly inappropriate when the subpoenaed materials are confidential presidential conversations.

In Part I of the brief, we show that the common law right to inspect court records does not in any way

authorize the court to provide the public with reproductions of items that are in the court's temporary custody pursuant to subpoena. Indeed, despite the heavy emphasis on the point by the court of appeals, the right to inspect court records is not directly involved in this case. The press and public were permitted to hear, report, and read transcripts of the conversations played in open court, and the court records in the Watergate conspiracy case were open for inspection on the same basis as in any other case. What the respondents seek is not simply the right to inspect court records, but the right to copy the recordings of presidential conversations and to exploit them for commercial purposes. Unlike docket sheets, pleadings and transcripts, all of which belong to the court, exhibits composed of subpoenaed materials are not the property of the court at all, but are in the court's temporary custody, solely for use as evidence. The public thus does not enjoy the same rights to copy and otherwise use such privately owned materials as it does in the case of true "court records," which are public property.

For a court to produce and distribute copies of subpoenaed presidential conversations would invade both the property and privacy interests of the participants in the conversations. The court cannot properly permit the appropriation of the taped conversations by private parties any more than it could permit a motion picture company to appropriate a valuable film clip simply because the film was used in a court proceeding. Moreover, court production and distribution of the subpoenaed tapes would subject private conversations to mass merchandising and commercial exploitation, a significantly more offensive intrusion on the participants' privacy interests than playing the conversations in court or publishing printed transcripts of them.

In Part II of the brief, we argue that the Constitution provides no more basis for producing copies of the subpoenaed conversations than does the common-law right of inspection. In the court below, the respondents claimed the right, under the First and Sixth Amendments, to obtain copies of the taped materials that were played to the jury. As this Court's cases make clear, however, the First Amendment provides no special right of access to such materials, much less any right to have a court produce and distribute them to the press and the general public. The Sixth Amendment affords the respondents no more support than the First, for the guarantee of a public trial to the accused can in no way be read to impose a duty on the court to disseminate copies of materials used as exhibits in a criminal trial.

In Part III, we argue that even if discretion exists as to public distribution of subpoenaed materials, that discretion does not permit dissemination of tape recordings of confidential presidential conversations, which this Court has ruled are entitled to "great deference" in their treatment by the courts. In balancing the claim of presidential privilege against the "demonstrated, specific need for evidence in a pending criminal trial," this Court recognized a narrow exception to the privilege, grounded in the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon, supra,* 418 U.S. at 713. That narrow exception did not contemplate the subsequent release of those sensitive presidential materials to be played on records and tapes commercially distributed to the American public. To make the prospect of such commercial treatment of subpoenaed presidential materials a necessary consequence of the use of those materials as evidence in a criminal trial would distort the balance carefully struck by this Court in *United States v. Nixon.*

Finally, in the last part of the brief, we argue that th court of appeals was flatly in error in reversing th decisions of both district judges not to release the tape conversations. While the court of appeals purported t affirm Judge Gesell, it in effect overruled his decisio that the conversations should not be disseminated to th public as long as they were subject to overcommercializ tion and undignified use. Moreover, the court held th Judge Sirica had abused his discretion in declining provide the respondents with copies of the conversatio on demand. The court of appeals was wrong on both counts. Applying the court's own analysis of the trial court's discretion to release or withhold exhibit materials, Judge Gesell's decision to withhold release because of the risk of overly commercial and undignified use of the materials was perfectly appropriate. And Judge Sirica determined not to release the conversations only after carefully weighing the competing factors, including the possibility of unfairness to the defendants in the Watergate conspiracy case. Even if the decision to disseminate copies of subpoenaed materials to the public is subject to the discretion of the trial court, Judge Sirica cannot fairly be accused of having abused that discretion. Instead, the court of appeals simply substituted its judgment for his, and on less well-considered grounds.

ARGUMENT

I.

THE COMMON LAW RIGHT TO INSPECT COURT RECORDS DOES NOT AUTHORIZE A COURT TO DISSEMINATE COPIES OF SUBPOENAED MATERIALS TO THE PUBLIC ON DEMAND

The court of appeals treated this case as if it involved an unexceptional application of the common-law right to inspect public records. Starting from the well-settled

proposition that the public is generally entitled to inspect court records, the court of appeals concluded that this right of inspection requires a district court to provide the public with copies of all exhibits offered in evidence in a criminal case, even if the exhibit materials were obtained from third parties under force of subpoena. Although the court suggested that court records may sometimes be sealed if "justice so requires," it added that there was a "serious question" whether refusing to produce exhibits that were displayed in open court is ever justifiable. (Pet. App. at 15a).

In affording such broad scope to the right of inspection, the court of appeals went far beyond the language or rationale of any of the authorities on which it relied. In fact, under the guise of merely applying a well-settled rule of access, the court created a surprising new doctrine under which persons responding to judicial subpoenas stand to suffer permanent and substantial injury to their interests in any subpoenaed materials.

In essence, the court of appeals employed the following analysis in ruling for the respondents: (1) the common-law right of inspection applies to all court records, including exhibits; (2) the petitioner retained no interest in the taped conversations after they were played in open court, and therefore had no grounds for objecting to their dissemination to the public; (3) tape recordings are subject to the common-law right of inspection and copying on the same basis as are documentary materials; and, therefore, the respondents have a clear right to obtain copies of the subpoenaed conversations. As we shall show, the court was wrong on all three points. First, subpoenaed materials used as exhibits do not belong to the court, and are not "court records" subject to inspection and copying in the same fashion as docket sheets, pleadings and transcripts. Second, a person producing materials

under force of subpoena retains his prior interests in the materials; the court has only temporary custody of them for the limited purpose of using them as evidence. Third, the courts have drawn a clear distinction between tape recordings and documentary materials with respect to rights of inspection and access, and they have not permitted copying of tape recordings of court proceedings even when those recordings are clearly "court records." Accordingly, not only is a court not required to provide copies of subpoenaed materials to the public, it has no authority to do so, even as a matter of discretion.

A. Subpoenaed Exhibit Materials are Not "Court Records," And Are Therefore Not Subject to the Common-Law Right of Inspection.

In a number of jurisdictions, the right of access to judicial records is governed by statute or court rule. See, *e.g., In re Mosher,* 45 C.C.P.A. 701, 248 F.2d 956 (1957); *Ex Parte Drawbaugh,* 2 App. D.C. 404 (1894); *State ex rel. Beckley Newspapers v. Van Hunter,* 127 W. Va. 738, 34 S.E.2d 468 (1945). In the absence of a controlling statute or rule, courts have held that court records should ordinarily be open to public inspection, subject to the trial judge's discretion to seal the record in particular cases. See, *e.g., Garfield v. Palmieri,* 193 F.Supp. 137, 143 (S.D.N.Y. 1961); *Sanford v. Boston Herald Traveler Corp.,* 318 Mass. 156, 61 N.E.2d 5 (1945); *State ex rel. Williston Herald, Inc. v. O'Connell,* 151 N.W.2d 758 (N.D. 1967). The rationale underlying this policy is that records belonging to the court are public property and that any general rule maintaining the secrecy of those records would be inconsistent with the principles favoring open and public court proceedings. See *Ex Parte Drawbaugh, supra,* 2 App. D.C. at 407-08; *cf. Nowack v. Auditor General,* 243 Mich. 200, 219 N.W.

749 (1928) (same policy applied to non-judicial records). This "public property" rationale supports the right to inspect court records such as docket sheets, pleadings and transcripts, since those documents are within "the common understanding of what belongs to a public court of record." *Ex Parte Drawbaugh, supra,* 2 App. D.C. at 407-08. It does not, however, require the court to produce and disseminate subpoenaed materials, which do not belong to the court at all, but are only in the court's temporary custody by virtue of compulsory process upon an individual or organization.

The court of appeals overlooked this important difference between papers belonging to the court and materials subpoenaed from third parties. Instead, it lumped the two groups together under the rubric of "court records" and held that the right of inspection applies in the same fashion to both.[9] This error was based on a serious misconception of the nature of a court's interest in subpoenaed materials. The court of appeals

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[9]To buttress its characterization of subpoenaed exhibit materials as "court records" and therefore as being within the reach of the general right of inspection, the court of appeals relied on Rule 10(a) of the Federal Rules of Appellate Procedure and the Manual for Clerks of the United States District Courts. Neither of these authorities supports even this semantic point.

Rule 10(a) refers to exhibits filed in the district court as being part of the "record on appeal." The inclusion of exhibits within the term of art "record on appeal" obviously does not make a particular exhibit a "court record"; many "court records" are not part of the "record on appeal," and vice versa. See *England v. Gebhardt,* 112 U.S. 502, 506 (1884). And the suggestion in the Clerk's Manual that documentary exhibits in historical cases be retained by the court was not intended to give the clerk a right to retain subpoenaed materials where their return is requested, but rather to guide the clerk where the choice is between retaining and destroying the materials. See Rules of the United States District Court for the District of Columbia, Rule 2-10(d).

apparently concluded that after materials are delivered to a district court in response to a subpoena, they become the property of that court, like any pleading filed by the parties. The court suggested, for example, that subpoenaed materials used as exhibits are customarily returned to their owners, not as a matter of right but as a matter of grace or convenience, and that if the court sees fit, it can choose to retain the subpoenaed materials permanently (Pet. App. 13a). This view is squarely contrary to well-settled principles of law and the consistent practice of the courts. Indeed, the proposition that subpoenaed materials belong to the court would come as a great surprise, for example, to a bank officer served with a subpoena *duces tecum* for previously stolen bank funds or to the owner of a valuable watch on which a thief's fingerprints were found.

The courts that have addressed the question have uniformly held that subpoenaed materials are in the court's temporary custody for use as evidence only, and that at the conclusion of the proceeding for which they were subpoenaed, they must be returned. Subpoenaed documents, as one court has written, "do not thereby become the property of the government or of the court." *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F.Supp. 1098, 1131-32 (E.D. Pa. 1976). See also *Hale v. Henkel,* 201 U.S. 43, 80 (1906) (McKenna, J., concurring); *In re Kelly,* 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.); *Application of Bendix Aviation Corp.,* 58 F.Supp. 953 (S.D.N.Y. 1945).[10] Instead, the clerk of a

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[10]This rule is subject to a limited exception in the case of materials subpoenaed for a grand jury investigation. When the government indicates that it intends to use the materials at trial, courts have occasionally declined to require the government attorneys to return the materials, which they would then

[footnote continued]

district court is "a mere custodian" of subpoenaed property, having custody only "as an incident of the trial before the District." *United States v. Monjar,* 154 F.2d 954, 957 (3rd Cir. 1946).

The interests retained in subpoenaed property, of course, extend beyond the simple right to its ultimate return. The subpoena *duces tecum* works the most limited possible invasion of the private rights in the subpoenaed materials, consistent with the compelled production of evidence.[11] Accordingly, as a "mere custodian," the court clerk does not have the right—much less the duty—to retain or dispose of subpoenaed property in a manner inconsistent with the private interests retained in that property.[12]

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immediately resubpoena under F.R. Crim. P. 17(c) or F.R. Civ. P. 45. *United States v. Gilboy,* 160 F. Supp. 442, 463 (M.D. Pa. 1958); *United States v. Maryland & Virginia Milk Producers Ass'n,* 151 F. Supp. 438, 440 (D.D.C.), *aff'd as modified,* 250 F.2d 425 (D.C. Cir. 1957). These cases, however, do not in any way suggest that the materials are the property of the government or the court; they turn instead on the principle that the court will not enter a pointless order.

[11]Unlike a search warrant, a subpoena *duces tecum* does not even disturb the right of possession of property; it merely alters the temporary right of custody. *In re Kelly, supra; Okland County v. Bice,* 386 Mich. 143, 191 N.W.2d 338 (1971); *In re Atlas Lathing Corp.,* 176 Misc. 959, 29 N.Y.S. 458 (Sup. Ct. 1941). As several courts have noted, the subject of a subpoena could technically comply with its demands by attending with the records during the hours of court and keeping the records with him at all other times. *United States v. Birrell,* 242 F. Supp. 191, 204 (S.D.N.Y. 1965); *Application of Bendix Aviation Corp., supra; In re American Sugar Refining Co.,* 178 F. 109 (C.C.S.D.N.Y. 1910); *In re Randall,* 87 App. Div. 245, 84 N.Y.S. 294 (1903).

[12]The courts have regularly respected the private rights retained in subpoenaed materials while those materials are in the custody of the court clerk or other government officers. See, *e.g.,*

[footnote continued]

Thus, while the right of inspection requires that the court ordinarily permit inspection and copying of court-owned materials, it does not require the court to give the same treatment to subpoenaed materials, and it certainly does not authorize the clerk to produce copies of those materials for public distribution over the opposition of the person from whom they were subpoenaed. Indeed, this Court suggested the limited use to which these very materials could be put when it remarked in *United States v. Nixon, supra,* 418 U.S. at 712 n.19, that production of the conversations was required only for the purpose of vindicating "the constitutional need for relevant evidence in criminal trials."

B. The Petitioner Retains Both Property and Privacy Interests in the Subpoenaed Materials

As we shall show, Mr. Nixon has continuing property and privacy interests in the recorded sound of the taped conversations. By extending the common-law right of inspection to require the dissemination of copies of those conversations, the holding of the court of appeals improperly disregards those interests and permits the respondents to appropriate the conversations and dispose of them as they choose. Nothing in the common-law right of inspection or in the practice of the federal courts permits such an extraordinary invasion of private rights.

Granberry v. District Court, 531 P.2d 390, 394 (Colo, 1975); *State v. Smithmeyer,* 110 Kan. 172, 175-76, 202 P. 638, 639-40 (1921); *In re Atlas Lathing Corp.,* 176 Misc. 458, 29 N.Y.S. 959 (Sup.Ct. 1941); *Carter v. Graves,* 12 N.C. 54, 55 (1826); *cf. In re Investigation,* 27 F. Supp. 997, 998 (S.D.N.Y. 1939).

1. The petitioner has a property interest in the taped conversations.

The courts have recognized that an individual has a property interest in the sound of his own voice. See *King v. Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963); *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964). In some settings, that interest has been regarded as a function of the creative effort of the performer, while in others it has been linked with the right to the exclusive use of the speaker's own name and reputation. See *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950). In either case, the fact that an expression is oral in no way deprives it of its status as property.

The property interest in a recorded conversation is perhaps most closely analogous to the property interest that has long been recognized in a person's private letters. Even when such letters are not literary creations—by intention or in fact—the courts have held that the writer enjoys a property right in those letters that must be respected by a court of equity. As early as 1841, Mr. Justice Story, sitting on circuit, resolved this question in the well-known case of *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841), which involved claims to various papers, including personal letters of President George Washington. Addressing the status of the President's personal letters, Mr. Justice Story wrote (9 F. Cas. at 346):

> In the first place, I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions or familiar letters of business, possesses the sole and exclusive copyright therein. . . . [T]hird persons, standing in no privity with either [sender or receiver] are not entitled to

> publish them, to subserve their own private purposes of interest, or curiosity, or passion.

This common-law property right in one's personal letters—even informal ones never intended for publication—has been consistently recognized since the *Folsom* decision.[13] See, *e.g.*, *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *Johnson v. Johnson*, 34 Ill. App. 3d 356, 340 N.E.2d 68, 78 (1975); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); M. Nimmer, Copyright §64 (1971).

In *King v. King*, 25 Wyo. 275, 168 P. 730 (1917), perhaps the closest reported case on its facts to this one, the defendant had sought to obtain copies of the plaintiff's letters, which were attached to a deposition on file with the court. As in this case, the defendant claimed a right to copy the letters and publish them because the letters, "being in the custody of the clerk by order of the court are in *custodia legis* and part of the public records to which all persons should have access at all proper times." 168 P. at 284. The court rejected this argument on several grounds, among them that the letters were not court records, and that the plaintiff had lost none of his property rights in the letters merely because they had been placed in the temporary custody of the court clerk. The court concluded (168 P. at 285):

> The letters being property after they had served their purpose as evidence stood in the same position

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[13] By referring to the sole and exclusive "copyright" Justice Story was, of course, referring to the common law property right in unpublished materials, not the statutory right stemming from the Copyright Act of 1909. Moreover, the difficult problem of separating the rights of the sender and the recipient of a letter is not present here, since the proposed publication in this case is by third parties who were not privy to the conversations.

as other personal property, which might be used in evidence, such as a watch which has been the subject of larceny, which should be returned to the owner.

The same principles apply to this case. The fact that Mr. Nixon's confidential communications with his associates have been recorded on a magnetic tape rather than in letter or memorandum form makes no difference to their status as property. And, as in the case of private letters, the choice of whether to release the recorded conversations belongs to Mr. Nixon, not to the respondents or the court.[14]

2. The petitioner has a privacy interest in the conversations that survives their being played in open court.

In addition to a property interest, the petitioner retains a privacy interest in the taped conversations, which would be infringed if aural copies of the conversations were publicly distributed. The court of appeals held that the petitioner enjoyed no privacy interest in the conversations, either before or after they

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[14]Of course, if a speaker dedicates his words to the public, he effects a "general publication" which deprives him of any further proprietary claims to the content or form of those words. See *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111 (1962); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972). Similarly, if the speaker understands that other participants in the conversation intend to record the speaker's words for publication, he may be deemed to have retained no property rights in that conversation. *Cf. Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2s 250 (1968). In this case, however, Mr. Nixon did not voluntarily make the conversations public, and it is not the participants, but independent third parties who seek to appropriate the aural record of the conversations.

were played to the jury. We submit that the court was wrong on both points.

Mr. Nixon plainly had a protectable privacy interest in the tapes prior to their use in the criminal trial. This Court said as much in *United States v. Nixon, supra*, 418 U.S. at 708, when it wrote: "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens." The court of appeals suggested that Mr. Nixon had no claim to privacy in the taped conversations because they were "not recordings of bedroom or other intimate conversations," but rather "conversations between business associates." (Pet. App. 22a.) This distinction, however, will not withstand analysis. There is no support, in the decisions of this Court or any other, for limiting the right of privacy to "bedroom or other intimate conversations." Indeed, if the court of appeals is correct that "conversations between business associates" are not protected by any privacy considerations, then the leading case of *Katz v. United States*, 389 U.S. 347 (1967), was wrongly decided, for that case involved a private business conversation, which the Court held was entitled to protection under the Fourth Amendment. See also *Silverman v. United States*, 365 U.S. 505 (1961).

As to the petitioner's present privacy claim, the court of appeals stated that any initial privacy interest in the conversations evaporated when the tapes were played in open court. This view interprets the petitioner's privacy claim as being limited to an asserted right of absolute confidentiality. But the variety of privacy interests recognized by the law include much more than just confidentiality. An individual has a privacy interest, for example, in preventing "appropriation of some element

of [his] personality for commercial exploitation," *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836, 843 (S.D.N.Y. 1975), and in avoiding the "unwanted and unwarrented publication of his likeness or activity." *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 496 (3d Cir. 1955) (Hastie, J., dissenting), *cert. denied*, 351 U.S. 926 (1956).

The fact that the contents of the conversations are no longer secret does not mean that exploitation of the recorded sound of the conversations is inoffensive and perfectly permissible. If, for example, a tape recording of a personal conversation between a man and his wife were made an exhibit at a criminal trial, we submit that the fact that it was played in open court and even reported in the newspapers would not deprive the couple of any privacy interest that they might assert if a record company sought to obtain the tape from the court for commercial distribution.[15]

A case that has recently been before this Court provides a graphic example of a privacy interest that has been recognized in spite of revealing prior publicity. In that case, *Roe v. Doe*, 33 N.Y.2d 902, 307 N.E.2d 823 (1973), *aff'g* 42 App. Div. 2d 559, 345 N.Y.S.2d 560,

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[15]Another difficulty with the respondents' answer to the privacy claim is that it contradicts their First Amendment argument. On the one hand, the respondents contend that the taped conversations have received such thorough press coverage already that further publicity would work no additional invasion of the petitioner's privacy. On the other hand, they insist that the coverage already given to the conversations is inadequate, and that the conversations must be disseminated in aural form before the public will appreciate their significance. Yet if the published transcripts provide much less satisfactory exposure to the conversations than an aural version, the petitioner plainly has an interest in preventing the conversations from being disseminated in this "revealing" new medium.

cert. dismissed as improvidently granted, 420 U.S. 307 (1975), a New York state court granted an injunction against further distribution of a book containing a psychiatrist's case study of one of his patients. The court found that the patient's right to privacy was violated because personal details of her life and treatment were openly discussed in the book, and her identity was not sufficiently disguised. Even though the patient's name had appeared in press reports about the book, and even though a number of copies of the book had already been distributed at the time the injunction was sought and entered, it was never seriously contended that the patient's continuing privacy interests had somehow been vitiated by the prior publicity.[16]

Finally, the court of appeals mistakenly measured the petitioner's privacy claim against the proof requirements of the common-law tort of invasion of privacy. In so doing, the court gave an unduly narrow construction to the petitioner's claim. Because of the potentially disruptive effects of damage awards in this relatively unchartered area, the courts have been wary of extending tort liability for invasion of privacy beyond the most clear-cut and outrageous cases. See *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 491 (1974). But the restricted sphere of tort liability does not define the limits of an individual's privacy interests for all purposes.[17]

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[16]Significantly, in spite of the prior publicity, this Court granted a motion to seal the record in the *Roe* case while it was pending on certiorari. 419 U.S. 819 (1974).

[17]The area of libel provides an apt analogy. Although tort law does not provide damages to a public figure for defamatory statements in the absence of "actual malice," that does not mean that the public figure does not retain an interest in not having such statements made about him. It merely means that the courts deem it too costly to other social values to permit him to vindicate that interest by collecting damages against the offender. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-42 (1974).

In this case, if the tapes are released, the actual sounds of the petitioner's confidential conversations will be available in permanent form to be played at cocktail parties, to be used in comedy acts or dramatic productions, and otherwise to be exploited for every purpose and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies. While the use of the recordings at trial certainly was contrary to the petitioner's expectations at the time he engaged in the conversations, that use was justified by what this Court termed "the fundamental demands of due process of law in the fair administration of criminal justice." The subsequent dissemination of aural copies of those conversations to the general public, however, is even more inconsistent with the petitioner's reasonable expectations of privacy in the conversations, yet not justified by any countervailing factor such as the need for the materials as evidence in a criminal trial. Accordingly, even if the respondents' use of the conversations in broadcasts and on records would not constitute a compensable tort, the court cannot ignore the petitioner's continuing privacy interest in the subpoenaed materials in determining whether it should release them to the public.

This view of the privacy interest is consistent with that adopted by the drafters of the Code of Judicial Conduct. In Canon 3A(7), the Code provides that a judge should prohibit recording of judicial proceedings except under narrowly defined circumstances. One of the prerequisites for recording is that each witness give his consent to having his testimony recorded. Canon 3A(7)(c)(ii). In his notes to that section, the reporter explains that the committee "was of the opinion that each witness should be entitled to decide if he wants to be involved in a project that entails inroads on his privacy beyond that

inherent in being a witness in court." Thode, Reporters Notes to Code of Judicial Conduct 58-59 (1973). In referring to the "privacy" of witnesses, the reporter did not, of course, mean to imply that a witness whose testimony was recorded without permission would be entitled to bring a tort action for invasion of privacy against court officers or other persons who distributed copies of the recording. Nonetheless, the committee recognized that recording of testimony "entails inroads on privacy," and that the witness' interest in privacy survives his testimony in open court. Mr. Nixon, whose recorded conversations were introduced into evidence, has a similar privacy interest in the contents of the recorded conversations. This Court should not sanction further inroads on that interest beyond those inherent in the use of the recordings at trial.

C. Courts Do Not Permit Copying of Tape Recordings, Even When They Are Plainly Court Records

1. The Courts Properly Distinguish Between Documentary and Recorded Materials.

The fact that an exhibit is not an official court record and that the clerk's function is merely custodial does not mean that the clerk is thereby prohibited from ever making copies of exhibits available to members of the public. Indeed, it may well be that district court clerks in some jurisdictions ordinarily provide such copies absent opposition or contrary instructions from the court. Even this practice, however, apparently does not extend to recorded or filmed exhibits, for neither the court of appeals nor the respondents could cite any instance in which copies of non-documentary exhibits

were provided to the public over the opposition of the owner or a party to the proceeding.[18]

Contrary to the suggestion of the court of appeals, the courts have drawn a sharp distinction between documentary materials and tape recordings. In this Court, for example, oral arguments are open to the public, and transcripts of oral arguments are made publicly available, but the tape recordings of the arguments are not released until three years after the date of the argument, and then only upon application by a person who agrees to limit the use of the recordings to scholarly or legal research.[19] No one obtaining recordings of arguments may duplicate or otherwise disseminate them.

More generally, it is hard to square the court of appeals' construction of the common-law rule with the almost universal prohibition against recording judicial proceedings for commercial use.[20] Some 39 district courts have local rules prohibiting aural recording of judicial proceedings, and no federal courts, so far as we

[18]The fact that the district court judges consulted by Judge Hart found the question of the release of the tapes a difficult one that should be left to the trial judge (App. 10-11) suggests that the practice of releasing such exhibits is not so common or uniform as the respondents contend. And at least one district court has a local rule specifically prohibiting the release of recorded deposition testimony for broadcasting purposes. C.D. Cal. Rule 29(h).

[19]This restriction on the use of recordings of court proceedings is similar to that in the Code of Judicial Conduct. Canon 3A(7)(c)(iv) provides that recordings of judicial proceedings can only be exhibited "for instructional purposes in educational institutions," a restriction intended to avoid undignified commercial exploitation of such sensitive recordings.

[20]As the district judges consulted by Judge Hart agreed, it is difficult to distinguish between playing tapes that contain exactly what was played in open court, and actually broadcasting portions of the proceedings.

are aware, expressly permit it.[21] Indeed, in the case of *Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967), the court held that the defendant was not entitled to make a recording of the trial proceedings even for his own use, at least where the proceedings were being reported by an official court reporter and daily transcript was being provided to the defendant.[22] Where the tape recordings have been prepared for later broadcast or distribution, courts have strongly condemned the practice, even when it has not deprived the defendant of a fair trial. See, *e.g.*, *Hudson v. State*, 108 Ga. App. 192, 132 S.E.2d 508 (1963); *Bisignano v. Municipal Court*, 237 Iowa 895, 23 N.W.2d 523 (1946), *cert. denied*, 330 U.S. 818 (1946); *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961). These decisions are not based solely on the need to avoid prejudicial publicity in criminal cases, but on the further consideration that commercial dissemination of aural recordings of a trial or an appellate argument would be undignified and would detract from the solemnity

[21]See D. Ariz. Rule 5(a); E.D. Ark. Rule 21(a); W.D. Ark. Rule 21(a); C.D. Cal. Rule 29(a); E.D. Cal. Rule 4(a); N.D. Cal. Rule 5(a); S.D. Cal. Rule 29(a); D. Colo. Rule 16; D.D.C. Rule 1-27(b); S.D. Fla. Rule 20; M.D. Fla. Rule 13(B); N.D. Ga. Rule 21.2; E.D. Ill. Rule 33; S.D. Ind. Rule 30; W.D. Ky. Rule 31; E.D. La. Rule 13.11(c); D. Md. Rule 15; D. Mass. Rule 29(a); E.D. Mich. Rule 26(a); D. Minn. Rule 7(d); W.D. Mo. Rule 25A; D. Neb. Rule 39D; D. Nev. Rule 12(b); D.N.H. Rule 26(a); D.N.J. Rule 36(e); D.N.M. Rule 19; E.D.N.C. Rule 11; W.D.N.C. Rule 5; D.N.D. Rule 3D; N.D. Ohio Rule 10; N.D. Okla. Rule 29(j); D. Ore. Rule 6(a); M.D. Pa. Rule 101.16; W.D. Pa. Resolution May 21, 1968; D.R.I. Rule 42(a); D.S.D. Rule 21(d); S.D. Tex. Rule 17; N.D. W.Va. Rule 1.16; E.D. Wis. Rule 15.

[22]In cases in which official transcripts have not been available, courts have occasionally permitted defendants to make tape recordings of the proceedings, but only for their personal use in a possible retrial or appeal. See *Davey v. Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974); *People v. Jaspar*, 393 Mich. 149, 224 N.W.2d 22 (1974).

appropriate to judicial proceedings.[23] In practice, then, the courts have not extended the common-law right of access and inspection to permit public recording of court proceedings and copying of recordings in the court's custody. Instead, those courts that have addressed the issue have distinguished between recordings and documentary materials and have placed much tighter restrictions on the use and distribution of recordings.

2. The Right to Inspect Recorded Materials Does Not Incorporate the Right to Obtain Copies of Those Materials.

Relying on cases involving documentary materials, the court of appeals concluded that the right of inspection necessarily incorporates the right to obtain copies of the inspected materials. We submit that, at least as applied to recorded materials, the court's conclusion does not reflect either actual practice or sound policy.

Perhaps the best illustration of the error in the court's reasoning is the practice followed with respect to the tape recordings that are often made by a court reporter to supplement his stenographic notes of trial proceedings. Under 28 U.S.C. §753(b), the reporter is authorized to make such recordings, and the public is authorized to inspect them.[24] This, of course, is not surprising, since

[23]As we noted above, the reporter for the Code of Judicial Conduct has advanced an additional reason for the reluctance to permit judicial proceedings to be recorded: protection of the privacy interests of parties and witnesses. Thode, Reporter's Notes to Code of Judicial Conduct 58-59 (1973).

[24]The statute provides that court reporters "shall record [the proceeding] verbatim by shorthand or by mechanical means which

[footnote continued]

the reporter's tape recording, like his stenographic notes, is plainly a "court record," and since the need for correct reporting is best served by permitting examination of the recording if there is doubt as to the accuracy of the stenographic notes.

It is equally plain that this right of inspection does not include the right to copy that particular "court record" and to disseminate copies of the tape recording for commercial purposes.[25] If it were otherwise, the respondents could obtain a copy not just of the taped conversations but of the whole Watergate conspiracy trial, simply by demanding the right to inspect and copy the reporter's tape recording of the entire proceeding. The fact that the respondents have not even ventured to request such relief demonstrates that they well appreciate the difference between requesting a copy of the transcript of a particular proceeding and a copy of the tape recording of that proceeding.

The same principle applies to exhibit materials. For example, the district courts in criminal cases routinely receive in evidence tape recordings derived from court-approved wiretaps. Though authorized by law, these recordings undoubtedly constitute invasions of the privacy of those whose voices are recorded. So far as we are aware, however, no suggestion has yet been made that

may be augmented by electronic sound recording." It further provides that the "original notes or other original records . . . shall be open during office hours to inspection by any person without charge."

[25]The local rules of a number of district courts expressly prohibit such use of the reporter's tape recordings of judicial proceedings. See, *e.g.*, C.D. Cal. Rule 29(b); E.D. Cal. Rule 4(b); S.D. Cal. Rule 29(b); D. Md. Rule 15; D. Mass. Rule 29(b); E.D. Mich. Rule 26(7); D.N.H. Rule 26(b); N.D. Ohio, Rule 10; D.R.I. Rule 42(b).

because the wiretapped conversations are made public as an unavoidable incident of a criminal trial, copies must be made available for broadcast and sale. Yet the principle advanced by the respondents in this case would certainly require such relief upon their demand, and in view of the often widely-publicized nature of cases utilizing wiretap evidence, such demands are inevitable. Similarly, no one has yet suggested, so far as we are aware, that films—obscene or otherwise—played in open court during a criminal trial must be copied and made available to the public, yet according to the principle urged by the respondents, there exists a legal right to such relief.

The court of appeals purported to deal with these examples by suggesting that courts can seal their records when "justice so requires," although it took back most of what it appeared to have conceded when it stated that it had serious doubts whether exhibits played in open court should *ever* be exempt from public copying (Pet. App. 16a). For the reasons previously discussed, we submit that a court has *no* authority to disseminate to the public copies of recordings that come into its temporary custody as exhibits. But even if some such authority exists, the principle that dissemination must occur unless "justice requires" otherwise in particular cases is unsatisfactory for several reasons.

First, the court provided no guidance as to what factors are sufficient to trigger the determination that "justice requires" that exhibits be sealed. Certainly if a case involving confidential conversations of a President of the United States is not one calling for discreet handling, it is difficult to imagine a case that would fit the court's bill. Second, the court's suggestion that exhibits played in open court must always be copied and distributed to the public on demand puts a district court in an unnecessarily difficult position. If an exhibit, such as a pornographic

movie or a wiretapped conversation, must be sealed and played only in a closed session of court in order to avoid having to disseminate copies of it to the public, then the court will be awkwardly caught between the public's demand for copies of the film or tape and the defendant's demand for a public trial. Finally, requiring persons who object to the dissemination of recorded materials to meet the heavy burden of showing that those materials should be sealed imposes an unfair and unnecessary hardship on them. In view of the increasingly common practice of tape recording and videotaping depositions, for example, witnesses would be subject to having their voices and images publicly exploited unless they could command the resources necessary to persuade a court that "justice required" that their deposition be sealed.[26] Besides finding no support in practice or case law, the proposal of the court of appeals for handling subpoenaed films and recordings is thus both impractical and unduly burdensome to those who are subjected to the compulsory process of a court.

In sum, the authorities and practices cited by the respondents and relied on by the court of appeals do not at all support the judgment below. Far from presenting any law, precedent, or principle *requiring* the district court to grant them the relief they seek, the respondents have failed to cite any authority even *permitting* a court to grant such relief. Neither the common-law right of

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[26]Rule 30(b)(4) of the Federal Rules of Civil Procedure provides that depositions may be taken "by other than stenographic means," and the practice of recording depositions has been greeted with favor by the courts. See, *e.g.*, *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975); *Marlboro Products Corp. v. North American Philips Corp.*, 55 F.R.D. 487 (S.D.N.Y. 1972). The use of recorded testimony has been approved in criminal cases as well. See *United States v. LaFatch*, 382 F. Supp. 630 (N.D. Ohio 1974).

inspection nor any formal or informal court practice authorized the district court to provide the respondents with copies of the taped conversations. Since the subpoenaed conversations did not become the property of the court, but instead were only in the court's temporary custody for use as evidence, the court of appeals erred in ordering the district court to distribute copies of the conversations to the public over the petitioner's objection and in derogation of his continuing interests in them.

II.

NEITHER THE FIRST NOR THE SIXTH AMENDMENT REQUIRES THE COURT TO DISSEMINATE COPIES OF THE TAPED CONVERSATIONS

In their initial applications, the respondents relied primarily on the First and Sixth Amendments to support their claims. Respondent Warner sought additional comfort, apparently, in the Fifth Amendment.[27] The court of appeals did not reach the constitutional claims, but an examination of the arguments briefed below demonstrates that the constitutional claims are not well founded.

[27]In its brief in the court of appeals, Warner complained that the district court had unlawfully discriminated against the "sound media" in favor of the print media, and that its decision had "denie[d] editorial freedom to the sound media." The "sound media" were not, of course, denied any privilege that was provided to others, and the fact that tape recordings would be more valuable to them in their business than would the transcripts previously provided to all the media does not give rise to a due process or equal protection claim. See *Estes v. Texas*, 381 U.S. 532, 540 (1965).

A. The First Amendment affords no support to the respondents' claim.

In the proceedings below, the respondents characterized Judge Sirica's refusal to provide them with copies of the "Watergate tapes" as a "prior restraint on expression" and argued that his action was therefore suspect under the First Amendment. In support of their argument, the respondents relied heavily on decisions of this Court and others striking down restraints imposed on what the press may report concerning public court proceedings. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) (Powell, J., in chambers); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). The short answer to this contention is that Judge Sirica's actions simply did not constitute a "prior restraint" under any proper understanding of the term. For this reason, as Judge Gesell held in his opinion of December 5, 1974, the respondents' First Amendment claim is "wholly without merit."

Because the consequences of labeling a particular order as a "prior restraint" are severe,[28] this Court has given the term a carefully circumscribed scope. Prior restraints, the Court has stated, include "orders that prohibit the publication or broadcast of particular information or commentary," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976), and arbitrary denials of a public forum to those seeking to use it for protected speech,

[28]The Court has never upheld an injunction that it has termed a "prior restraint" on protected expression, despite intimations that some such restraints may be permissible. See *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, *supra*, at 591 (Brennan, J., concurring in the judgment).

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). Other actions, however, such as criminal prosecutions or civil suits based on the contents of a publication, are not considered prior restraints, even though they may in various ways discourage speech. See *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 559; *id.* at 594 n.20 (Brennan, J., concurring in the judgment); *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 731 (White, J., concurring). Similarly, a policy, statute or order providing that particular information will remain confidential or otherwise out of the public domain is in no sense a "prior restraint," even if the press would choose to publish that information if the Government made it available. See *Pell v. Procunier*, 417 U.S. 817, 829-30 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Zemel v. Rusk*, 381 U.S. 1 (1965).

In this case, Judge Sirica did not in any way prohibit the respondents from publishing any information they had or from printing or distributing anything they pleased. The respondents' complaint below was simply that the district court had declined to prepare and provide them with an aural transcription of certain portions of tape recordings in its custody—recordings that the press had already heard and fully reported. The court's action imposed no "restraint" on the respondents unless that term is to be read to include any refusal by a court or other governmental agency to provide members of the press any material or information they may desire.

Alternatively, the respondents argued that Judge Sirica's refusal to provide them with copies of the taped conversations deprived them of their constitutional "right of access" to newsworthy materials. In light of recent decisions of this Court declining to grant the press any special right of access to news sources, and in view of

Judge Sirica's extraordinary accommodations to the press at the trial, the "access" argument is totally without force here.

Judge Sirica permitted reporters to be present when the tapes were played in the courtroom; he provided them with earphones so that they could hear the tapes accurately and conveniently; and he provided them with complete transcripts of the conversations, which they could, and did, reproduce and report widely. To call his refusal to provide copies of the tapes for commercial use a "denial of access" is to stretch that term beyond any useful meaning. What the respondents seek is much more than just *access* to the recorded conversations. They want the court to provide them with reproductions of the material so that they may broadcast and distribute them for sale. Yet the respondents have cited no case whatsoever suggesting that the First Amendment gives them any such right. Indeed, in *Zemel v. Rusk*, 381 U.S. 1 (1965), this Court cautioned against the same kind of broad-based claim of "access" that is asserted here. In that case, the petitioner argued that denying him the right to travel to Cuba impermissibly restricted his First Amendment right of access to information about that country. In response, the Court wrote (381 U.S. at 16-17):

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Even if this case presented a true question of "access," the respondents could claim no special First Amendment right to information kept out of the public domain. In several recent cases, this Court has made it clear that the press has no right of access to information greater than that available to the public generally. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); see *Houchins v. KQED, Inc.*, 97 S.Ct. 773 (1977) (Rehnquist, J., in chambers); *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959); *McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376 (Pa. 1975).

The poverty of the respondents' First Amendment argument is perhaps best illustrated by examining the one recent case which they characterized below as "dispositive" of this case and as the "controlling precedent." That case is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which held unconstitutional a Georgia statute making it a misdemeanor to publish the name of a rape victim. The petitioner television station in that case had broadcast the victim's name after obtaining the information from public court records. The Court held the Georgia statute unconstitutional on the ground that it imposed sanctions on pure expression—the content of a publication—rather than on "conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 495. The First and Fourteenth Amendments, the Court wrote, "command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." *Id.*

It is difficult to understand how *Cox Broadcasting* could be deemed "dispositive" or "controlling" here. The

Georgia statute did not bar the court from disclosing the rape victim's name. Instead, the restraint imposed by the statute was one on publication of information that the television station already had or could readily obtain from public records. Had *Cox Broadcasting* involved, for example, a refusal by the Georgia trial court to provide for broadcast purposes a copy of a police photograph of the deceased victim, the decision would have had precedential value here. But far from suggesting the proper resolution of such a case, the Court specifically noted that its ruling did not address the question of a refusal of access to official court records, 420 U.S. at 496 n. 26, much less any obligation on the court to provide the press with copies of exhibit materials.[29] Accordingly, the *Cox Broadcasting* case, like the cases involving issues of "prior restraint" and "media access," is plainly not "dispositive" or "controlling" here. Instead, both *Cox Broadcasting* and the other authorities on which the respondents have premised their First Amendment claims demonstrate how far short they fall of finding a First

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[29]The fact that the Court did not intend its ruling in *Cox Broadcasting* to confer on the press any constitutional right to obtain copies of materials before the court is made even clearer by the recent *per curiam* decision in *Oklahoma Publishing Co. v. District Court*, 97 S. Ct. 1045 (1977). That case, like *Cox Broadcasting*, involved the constitutionality of a prohibition against publication of "widely disseminated information, obtained at court proceedings which were in fact open to the public." 97 S. Ct. at 1046. In the course of its opinion, the Court had occasion to note the narrow scope of the *Cox Broadcasting* holding (97 S. Ct. at 1046, citations omitted): "The Court in *Cox Broadcasting* expressly refrained from intimating a view on any constitutional questions arising from a state policy of denying the public or the press access to official records of juvenile proceedings, but made clear that the press may not be prohibited from 'truthfully publishing information released to the public in official court records.' "

Amendment violation in Judge Sirica's refusal to provide them with copies of the taped conversations.[30]

B. The Sixth Amendment right of the defendants to a public trial has been fully satisfied.

The respondents have based their applications on the Sixth Amendment as well as the First. In so doing, however, they have ignored the plain constitutional language, which guarantees a public trial to "the accused," not to the press. *Estes v. Texas*, 381 U.S. 532, 538 (1965); *Weissman v. United States*, 387 F.2d 271, 273 (10th Cir. 1967); *Geise v. United States*, 265 F.2d 659, 660 (9th Cir. 1959); *United States v. Sorrentino*, 175 F.2d 721, 722-23 (3d Cir. 1949); 1 Cooley, Constitutional Limitations 647 (8th ed. 1927). The Sixth Amendment guarantee does, of course, benefit the public by encouraging confidence in our judicial institutions, as well as the particular interest of the defendant in guarding against the arbitrary authority which is more likely exercised in private than under public scrutiny. See *In re Oliver*, 333 U.S. 257, 270 (1948).[31] But the Clause

[30]The other cases relied upon by respondents below in support of their First Amendment arguments are similarly inapposite, for each involved a restriction on what may be said or reported about a public judicial proceeding. See *Craig v. Harney*, 331 U.S. 367 (1947) (newsman held in contempt for article critical of trial judge's handling of a case); *Bridges v. California*, 314 U.S. 252 (1941) (labor official held in contempt for public criticism of judicial decision); *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102 (5th Cir. 1974) (bar against publication of sketches of court proceedings); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (newsmen held in contempt for violating judge's prohibition on reporting of testimony taken in open court).

[31]Even the right of the defendant is limited by the need to maintain order, *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965); to prevent offensive evidence from being exhibited to the general public, *Lancaster v. United States*, 293

[footnote continued]

is not a sword for the press; it confers no right to have the proceedings conducted so as to enable members of the press to cover the proceedings as they deem most suitable. See *Estes v. Texas, supra*, 381 U.S. at 583 (Warren, C.J., concurring). Justice Harlan, concurring in *Estes v. Texas, supra*, 381 U.S. at 588-89, stated the matter succinctly:

> [T]he right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. . . . A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The companion cases of *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954), and *United Press Associates v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954), provide a particularly instructive application of this principle. In the *Jelke* case, the New York Court of Appeals held that an order by a trial judge excluding the press and public from the courtroom during a large part of a criminal trial had deprived the defendant of his right to a public trial. Accordingly, the court reversed his conviction on that ground. In the *Valente* case, decided the same day, the court considered the same ruling on an application

F.2d 519 (D.C. Cir. 1961); to prevent unnecessary embarrassment to a witness, *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958); or to protect confidential information, *United States v. Slocum*, 464 F.2d 1180, 1184 (3d Cir. 1972); *People v. Hagan*, 24 N.Y.2d 395, 300 N.Y.S.2d 835, 248 N.E.2d 588, *cert. denied*, 396 U.S. 886 (1959).

brought by various press agencies. The court in *Valente* affirmed the dismissal of that application on the ground that the press could not invoke the defendant's right to a public trial. That right, the court held, was the defendant's and only the defendant's.

Chief Judge Fuld emphasized at the outset that the *Valente* case did not in any way involve freedom of the press. The First Amendment, the court stated (123 N.E.2d at 779):

> has . . . never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others. Judicial proceedings are viewed as 'a public event,' in the sense that 'Those who see and hear what transpired can report it with impunity.' *Craig v. Harney, supra,* 331 U.S. 367, 374. But freedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to 'see and hear what transpired.'

On the issue of the right to a public trial, the court stated that since the primary purpose of that guarantee is "safeguarding the accused against possible unjust persecution and abuse of judicial authority," it is "for the defendant alone to determine whether, and to what extent, he shall avail himself" of this right. *Id.* at 780.

Even if the respondents *could* assert the rights of the accused, the Sixth Amendment's requirements were obviously satisfied during the Watergate trial. Indeed, that proceeding may have been the most open and most publicized trial in our history. As to the tape recorded conversations desired by the respondents, each was played on equipment enabling every member of the press and public in attendance to listen through earphones installed at government expense. A less accommodating procedure for playing recorded exhibits in a criminal trial

has uniformly been held to satisfy the requirement of a public trial. See *Gillars v. United States,* 182 F.2d 962, 977 (D.C. Cir. 1950) (treason trial involving playing recorded radio broadcasts); *D'Aquino v. United States,* 192 F.2d 338, 365 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952) (same); *United States v. Kohne,* 358 F.Supp. 1053, 1063 (W.D. Pa.), *aff'd,* 487 F.2d 1395 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974) (recorded wiretap evidence heard through earphones). Because a public trial was provided to the only parties constitutionally entitled to claim it, the district court's obligations under the Sixth Amendment were thus plainly satisfied, without the need to disseminate copies of the taped conversations to the press.

III.

THE DEFERENCE DUE TO SUBPOENAED PRESIDENTIAL MATERIALS MAKES PUBLIC DISTRIBUTION OF THE TAPED CONVERSATIONS PARTICULARLY INAPPROPRIATE

We have argued above that a federal district court has no authority to disseminate copies of subpoenaed exhibit materials to the general public. Accordingly, we disagree with the ruling of the court of appeals that the question whether to provide copies of recorded exhibit materials to the public is a matter for the district court's discretion. Yet even if a district court *does* have discretion to release copies of subpoenaed materials over objection, it would not be justified in exercising that discretion in this case, for the taped materials here at issue are not just ordinary subpoenaed materials; they are recordings of confidential presidential conversations, which are entitled to a "high degree of deference" in their treatment by the courts.

In *United States v. Nixon, supra,* this Court made it clear that a district judge must deal with presidential conversations in a manner very different from the way he

would handle ordinary subpoenaed materials. The Court recognized a presumptive privilege for confidential presidential communications, based on "the values to which we accord deference for the privacy of all citizens" as well as "protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decisionmaking." *Id.* at 708. Balancing these interests against the "demonstrated, specific need for evidence in a pending criminal trial," the Court held that the tapes should be produced for *in camera* inspection. Id. at 713. In so doing, however, the Court authorized only the most limited use of the conversations consistent with "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 713.

Unlike the treatment ordinarily accorded to subpoenaed materials, the subpoenaed presidential conversations were first to be delivered to the district court for *in camera* screening. The district court was then instructed to excise all material not meeting the tests of admissibility and relevance, and to return that material to the President under seal. In handling the subpoenaed conversations, the district court was "*at all times* [to] accord to presidential records that high degree of deference suggested in *United States v. Burr.*" *Id.* at 715 (emphasis added).

Both during the trial and afterwards, Judge Sirica acted in strict accordance with this Court's directive. In an exhaustive *in camera* examination, he reviewed the entire mass of subpoenaed conversations. He then provided to the Special Prosecutor only the material he deemed relevant and admissible at trial. When the taped conversations were played in court, Judge Sirica did not attempt to prevent the press from reporting their contents, a course that would have met with substantial constitutional objections. As to the subsequent requests for taped

copies of the conversations, however, neither the needs of fairness in the criminal case nor any other constitutional imperative required the court to contribute to this further dissemination of the presidential materials. Recognizing the special status of those materials and the likelihood that they would be subjected to undignified commercial exploitation, Judge Sirica properly declined to order copies of the tapes to be made and released to the respondents.

For Judge Sirica to have done otherwise would have distorted the balance drawn by this Court in *United States v. Nixon.* In discussing the competing considerations of presidential confidentiality and the need for evidence in a criminal case, this Court stressed the limited scope of the inroad it was making on the presidential privilege. The Court did not in any way suggest that the use of the conversations in a criminal trial would mean that they could be broadcast into the living rooms of the American public and enshrined among the Top 40 best-selling phonograph records. Yet if the decision below is upheld, it will significantly alter the balance that may be struck in future cases involving confidential presidential materials. Instead of simply weighing the interest of presidential confidentiality against the need for evidence in a criminal trial, a court will have to consider as a further factor the likelihood of wholesale commercial exploitation of the subpoenaed materials. Adding this factor to the balance can only have the effect of either denigrating the presidential privilege or further narrowing the circumstances under which the privilege will be overridden.

It is hardly necessary, we trust, to review here the content of the recordings at issue. Putting aside the substance of the conversations as they relate to the Watergate affair, they contain exactly the kind of blunt,

candid, and even profane remarks that one might expect in recordings of conversations among close associates, none of whom contemplated public airing of his words. Some of the remarks are embarrassing to third parties—even to at least one head of a foreign state—and some reflect opinions perhaps not well-considered by the speaker, but which he did not expect to be replayed for the entertainment of the American public. It is true, as the respondents note, that these conversations are no longer confidential. It is also true, as they have refused to admit, that the uses to which they, and others, propose to put the recordings will constitute a far more serious intrusion on the sensibilities of those whose voices appear on the tapes than any publication of transcripts or reporting of their contents. In essence, the respondents seek to make the participants in these private conversations unwilling actors in their broadcasts and phonographic productions. As we have discussed, to do so would constitute an intrusion on the privacy of the participants and an improper disposition of property in the court's custody. But perhaps most important, it would constitute a particularly unwarranted and inappropriate treatment of confidential communications among the highest officials of a coordinate branch of government.

Nothing in *United States v. Nixon* remotely authorizes such a result, and we submit that it would be inconsistent with the spirit, if not the language, of that case to permit the commercial exploitation of the presidential conversations involved in this case. At the very least, it was entirely proper for Judge Sirica to take that factor into consideration in exercising his discretion not to grant the requested relief.

IV.

NEITHER DISTRICT COURT JUDGE ABUSED HIS DISCRETION IN DECLINING TO RELEASE COPIES OF THE TAPED CONVERSATIONS

Even on its view that the district court was authorized to release copies of the taped conversations, the court of appeals recognized that it could reverse only if it found that Judge Sirica had abused his discretion in declining to order their immediate release. Yet in spite of Judge Sirica's carefully considered decision, and in spite of the fact that Judge Gesell had earlier declined to provide copies of the conversations to the respondents, the court held that Judge Sirica had abused his discretion, and it overruled both district court judges in their determinations not to release the tapes. Because the decisions of the two district court judges did not even approach an abuse of discretion, the holding of the court of appeals was even more clearly erroneous than the legal theory underlying it.

In his December 5, 1974 opinion, Judge Gesell made it plain that he did not regard it as settled that the taped conversations should ultimately be released. Any release of the materials, he wrote, would be contingent upon a plan of distribution that would "not permit overcommercialization of the evidence" (Pet. App. 42a). In fact, Judge Gesell ultimately declined to release the tapes precisely because no satisfactory plan had been proposed by which "commercialization of the tapes or any undignified use of the material [would] be minimized" (Pet. App. 44a). The court of appeals phrased the question of the propriety of release as "whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect any copy the tapes" (Pet. App. 21a). This statement, however, ignores the fact that Judge Gesell did *not* permit the respondents

to inspect and copy the tapes. Quite the contrary, he denied their applications without prejudice.

While Judge Gesell held that the tapes should not be released as long as they might be put to improper uses, the court of appeals directed that the taped conversations must immediately be produced, regardless of the uses to which they may be put.[32] Accordingly, it is inaccurate for the court of appeals to state that it affirmed Judge Gesell in the exercise of his discretion. In fact, under the banner of approbation, it reversed Judge Gesell's decision not to release the tapes and rejected the reasons underlying it.

To the extent that the court of appeals dealt at all with the concern about possible overcommercialization and undignified use of the taped conversations, it suggested that any objection to "unseemly" public marketing of the White House conversations "is essentially a question of taste" which provides "a singularly weak basis for a court to interfere with the exercise of a long-established common law right" (Pet. App. 25a). Precisely this "question of taste," however, was at the base of each of the cases cited by the court of appeals for the proposition that a trial court may, in its discretion, close some part of its record to the public. In domestic relations cases, for example, the courts have sealed the records "in their discretion" for precisely the reason that Judge Gesell gave in this case for declining to release the taped conversations: the records would become the subject of commercialized gossip, and would be used for undignified purposes. See *C. v. C.*, 320 A.2d 717, 723 (Del. 1974); *Sanford v. Boston Herald Traveler Corp.*, 318 Mass. 156,

[32]Both the court of appeals and the respondents have concluded that it is not constitutionally possible to limit the uses—even commercial and undignified uses—to which the tapes can be put after they are released. See Pet. App. 21a n.52.

158, 61 N.E.2d 5, 6 (1945); *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893). Judge Gesell's reasons for releasing the tapes were thus entirely in harmony with the kinds of considerations that the courts have properly recognized in denying public access to court records, and the court of appeals should not have overruled him on that score.

In holding that Judge Sirica had abused his discretion, the court of appeals was more straightforward, but equally in error. Judge Sirica's primary concern, as indicated in his April 4, 1975 opinion, was the effect that immediate release of the recordings might have on the rights of the defendants in the Watergate conspiracy case. In addition, however, he took into consideration the deference owed by the courts to the Presidency, and the interests of those whose words are captured on the tapes in being free from commercial exploitation of their private conversations. Against these considerations Judge Sirica weighed the argument of the applicants in favor of the speedy release of the tapes and found it unconvincing. Under the circumstances of this case, Judge Sirica's decision cannot fairly be characterized as an abuse of discretion.

A judge in a criminal case has a heavy responsibility to conduct the proceedings in such a way as to protect against unwarranted publicity that might affect the fairness of the trial. As this Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966):

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Judge Sirica found that the rights of the criminal defendants "might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes." The respondents did not argue below that this was an improper factor for the district court's consideration. Rather, they belittled Judge Sirica's concern, and argued that he gave it too much weight. It is well established, however, that the task of assessing and minimizing the effects of prejudicial pretrial publicity is committed to the discretion of the district court. See, *e.g.*, *United States v. Nix*, 465 F.2d 90 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); *United States v. Jobe*, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963). In this case, Judge Sirica's judgment as to the dangers inherent in immediate release of the conversations rested on firm ground and should not have been disturbed by the court of appeals.

The tapes were perhaps the most critical evidence in the criminal case, and it was essential that they be considered by a jury only under appropriate instructions, only as a whole and not in selections, and only in conjunction with all the other evidence in the case, including the witnesses' explanations of the context, the circumstances, and the intended meaning of each statement. None of these safeguards would be or could be provided by persons broadcasting and marketing the tapes. The editing, arrangement and commentary of the marketed products would undoubtedly be accomplished, at least by some of the companies involved, in such a way as to have maximum popular appeal, and marketing would obviously be highly competitive and accompanied by sophisticated mass merchandising techniques. It is not possible, we submit, to take seriously the suggestion that potential jurors exposed to these sensations would be unaffected.

In exercising his discretion, Judge Sirica fully considered the asserted public interest in receiving information about the Watergate trial and concluded that because the content of the tapes has been made fully public, the "public's right to know" has little if any application in this case. The respondents countered this finding with the suggestion that "voice inflections, pauses and the like" have not been adequately communicated to the public. Yet whatever the marginal value that might be afforded by release of the tapes in addition to the transcripts that are already available, we submit that the "right to know" about voice inflections and pauses on the tapes hardly constitutes such a compelling factor that Judge Sirica can be said to have abused his discretion in failing to accord it more weight than the interest of the Watergate defendants in the fairness of any retrial.

In its own analysis, the court of appeals misapplied even those principles that it deemed controlling. First, the court stated that Judge Sirica's concern over the potential for prejudicial publicity was unjustified as long as retrials were "only a possibility." Yet in the same breath the court noted that one of the Watergate conspiracy convictions had been reversed, which apparently rendered a retrial of at least one of the defendants more than a mere possibility.[33] Nonetheless, the court stated that "this does not . . . alter our conclusion that interference with appellants' right to inspect and copy the tapes is not justified." (Pet. App. 17a & n.41). Second, the court took comfort in the fact that none of the Watergate defendants had filed an objection in the district court to the dissemination of the tapes. Yet at

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[33]Defendant Mardian's conviction was reversed. *United States v. Mardian*, No. 75-1383 (D.C. Cir. Oct. 12, 1976). After the court of appeals handed down its opinion in the present case, the Special Prosecutor announced that he would not seek a retrial in that case.

the same time, the court noted that one of the defendants had filed precisely that objection in the court of appeals. Nonetheless, it concluded without further ado that his objection "hardly warrants careful attention." (Pet. App. 20a & n.47). Third, the court attached importance to the Special Prosecutor's lack of formal opposition to the applications for release of the tapes. Yet the court ignored the Special Prosecutor's recommendation that the decision on release be left to the discretion of the district court, and it was similarly unmoved by the Special Prosecutor's statement that he could not be confident that "large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial."

Although the risk of retrials in the Watergate conspiracy case has now been substantially reduced, the opinion of the court of appeals cannot thereby be retroactively redeemed. As we have noted, Judge Sirica based his conclusion in part on the same ground that troubled Judge Gesell: the risk of undignified and overly commercial use of the subpoenaed materials. In addition, Judge Sirica relied on the "solemn responsibility" to treat presidential records with particular deference, a factor that does not turn on whether the criminal convictions are final or not. And finally, because the opinion of the court of appeals gave such hostile treatment to the trial judge's efforts to reduce the risk of prejudicial publicity in a criminal trial, this Court must not allow that precedent to stand, even if the risk of prejudice has now passed. Judge Sirica properly denied the respondents copies of the subpoenaed materials, and his decision should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in this case should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON, *Petitioner,*

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al., Respondents.*

BRIEF FOR RESPONDENT WARNER COMMUNICATIONS, INC.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON, *Petitioner,*

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al., Respondents.*

BRIEF FOR RESPONDENT WARNER COMMUNICATIONS, INC.

QUESTION PRESENTED

Whether the public's right to inspect and copy court records—specifically, those portions of tape recordings of presidential conversations that were entered into evidence and played in open court during the trial of *United States* v. *Mitchell,* Cr. No. 74-110 (D.D.C. 1974)—is outweighed by the purely personal interests of Richard Nixon.

STATEMENT

A. Introduction

The respondents in this case have applied for permission, as members of the public, to inspect and copy those tape recordings of presidential conversations that

were played in open court as part of the evidence in the Watergate Cover-Up trial. The petitioner's opposition to these applications has posed a question fundamental to the operation of our democratic system and to our concept of public justice: will the narrow and purely personal interests of former President Richard Nixon be permitted to thwart the centuries-old right of the American public to inspect and copy court records?

The Court of Appeals has held that those tape recordings of presidential conversations that were played at the Watergate Cover-Up trial are part of the public record of the District Court and thus subject to the public's right of access. Any conceivable countervailing interest of justice that might have been served by denying the public access to these materials has been stripped away by this Court's refusal to review the convictions in *United States* v. *Mitchell, cert. denied,* 45 U.S.L.W. 3764 (May 23, 1977) (Nos. 76-793, 1081), and by its decision upholding the constitutionality of the Presidential Recordings and Materials Preservation Act in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917 (June 28, 1977).

It need hardly be added that this case arises in an historical context that is totally unprecedented in the history of the United States, a context that commands deference to the public's right to be informed. Not only is the subject matter of this case the principal evidence used to convict some of the most powerful public officials ever to be charged with crimes in this Nation's history, it is also that evidence solely responsible for compelling the first President of the United States to resign his office in mid-term.

By granting the American public access to these materials, this Court will not only reaffirm the age-old right of the public to inspect and copy official court records, it will also serve the larger interest of providing the American people and their posterity objective and unfiltered evidence of the historic abuses of governmental power that have come to be known as "Watergate."

B. The Watergate Break-In and Events Surrounding the Production of the Subpoenaed Tape Recordings

On June 17, 1972, five men employed by the Committee to Re-elect the President were arrested while installing electronic bugs on telephones in the headquarters of the Democratic National Committee located in the Watergate office building in Washington, D.C. Three months later, on September 15, 1972, those five individuals, along with E. Howard Hunt and G. Gordon Liddy, were indicted on federal charges related to the Watergate break-in. *United States* v. *Liddy,* Cr. No. 1827-72 (D.D.C. 1972). On January 8, 1973, all of the defendants except Liddy and James W. McCord entered guilty pleas. McCord and Liddy were convicted by the jury on January 30, 1973.[1]

On June 25-29, 1973, former Counsel to the President John W. Dean III testified before the Senate Select Committee on Presidential Campaign Activities ("the Ervin Committee") and accused then President Nixon of knowing about and participating in a con-

[1] Those convictions were affirmed. *United States* v. *Liddy,* 509 F.2d 428 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 911 (1975); *United States* v. *McCord,* 509 F.2d 334 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 930 (1975).

spiracy to impede the FBI's investigation of the Watergate break-in.[2] On Monday, July 16, 1973, H. R. Haldeman's chief deputy in the White House, Alexander P. Butterfield, testified before the Ervin Committee and described the elaborate system for tape recording conversations that had been installed by order of President Nixon in the Oval Office of the White House and in Nixon's private office in the Executive Office Building.[3]

As a result of Butterfield's testimony, on July 23, 1973, Special Prosecutor Archibald Cox, acting on behalf of the June 1972 grand jury, caused a subpoena *duces tecum* to be issued to Mr. Nixon. That subpoena required Mr. Nixon to turn over to the grand jury tape recordings of eight meetings and one telephone call. In a letter to Judge Sirica dated July 25, 1973, Mr. Nixon advised that the tape recordings would not be provided, arguing that as President he was not subject to compulsory process from the courts.

On August 29, 1973, Judge Sirica ordered that the requested tapes be turned over to him for *in camera* inspection. *In re Subpoena to Nixon,* 360 F. Supp. 1 (D.D.C. 1973). On October 12, 1973, the Court of Appeals affirmed Judge Sirica's decision upholding the validity of the subpoena. *Nixon* v. *Sirica,* 487 F.2d 700 (D.C.Cir. 1973). That decision was not appealed.

On Saturday, October 20, 1973, President Nixon directed that Special Prosecutor Cox be fired. Attorney General Elliot L. Richardson and Deputy Attorney

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[2] *Hearings Before the Senate Select Committee on Presidential Campaign Activities,* 93d Cong., 1st Sess., Book III, p. 911 (1973).

[3] *Ibid.,* Book V, p. 2073.

General William D. Ruckleshaus resigned, and Solicitor General Robert H. Bork, then Acting Attorney General, carried out the President's order. Three days later, on Tuesday, October 23, 1973, Mr. Nixon, through his attorney, informed Judge Sirica that he would, in fact, comply with the Court's order requiring that the tapes be turned over. In early November, the White House submitted original recordings of seven of the nine subpoenaed tapes and informed the Office of the Special Prosecutor that two of the requested tapes of presidential conversations were missing.[4]

On March 1, 1974, seven individuals, including former Attorney General John N. Mitchell, former Assistant Attorney General Robert C. Mardian, White House Chief of Staff H.R. Haldeman, and President Nixon's top domestic advisor, John D. Ehrlichman, were indicted for, among other things, conspiring to obstruct justice in connection with the government's investigation of the Watergate break-in. Richard Nixon was named by the grand jury as an unindicted co-conspirator.

On April 18, 1974, the new Special Prosecutor, Leon Jaworski, issued a second subpoena *duces tecum* to Mr. Nixon, requiring him to produce for use at the trial of *United States* v. *Mitchell* certain tapes and other documents relating to sixty-four presidential conversations. The Special Prosecutor also requested a protective order to deter mishandling or erasure.

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[4] Certain portions of the tapes turned over as a result of this first subpoena were played during the trial of *United States* v. *Mitchell, supra* (hereinafter "the Watergate Cover-Up trial" or *United States* v. *Mitchell*), and constitute, in part, the subject matter of this case.

On April 29, 1974, in a nationally televised speech, Mr. Nixon released edited transcripts of forty-six tapes, stating, "[E]verything that is relevant is included . . . ." and claiming that "These materials—together with those already made available—will tell it all." *The Washington Post,* April 30, 1974, p. A-8.

On May 20, 1974, Judge Sirica denied Mr. Nixon's motion to quash the Special Prosecutor's subpoena and directed that the tapes be delivered for *in camera* inspection to determine which portions, if any, would be released to the Special Prosecutor for use in the Watergate Cover-Up trial. On July 24, 1974, the Supreme Court unanimously upheld the validity of the subpoena and affirmed Judge Sirica's order. *United States* v. *Nixon,* 418 U.S. 683 (1974).

Three days later, the House Judiciary Committee completed hearings on the impeachment of Richard Nixon and, by a vote of 27-11, approved the first of three articles of impeachment charging Mr. Nixon with obstruction of justice in connection with the Watergate break-in.

On August 5, 1974, the White House released partial transcripts of three subpoenaed conversations between Mr. Nixon and H.R. Haldeman. The transcripts of these June 23, 1972 conversations proved that Mr. Nixon himself had directed that the CIA be ordered to halt the FBI's investigation of the Watergate break-in.

On August 9, 1974, Mr. Nixon resigned his office.

On Sunday, September 8, 1974, Mr. Nixon accepted a full pardon from his successor, President Gerald R. Ford.

C. The Use of the Tapes at the Watergate Cover-Up Trial

In accordance with *United States* v. *Nixon, supra,* attorneys for Mr. Nixon turned over the requested tapes to Judge Sirica who, after listening to them *in camera,* arranged to have a copy made of the admissible and relevant portions. These "edited tapes" were then given to the Special Prosecutor for use at the Watergate Cover-Up trial.

The trial commenced on October 1, 1974. Charles Colson pleaded guilty prior to trial, and Gordon Strachan's case was severed and ultimately dismissed. During the trial most, but not all, of the edited tapes were played—approximately 22 hours worth of tape recordings.[5] Whenever the tapes were played, the jurors, members of the news media, and members of the public in attendance were furnished with earphones and with transcripts prepared by the Office of the Special Prosecutor. Those portions of the tapes that were played were formally entered into evidence; the transcripts were not. The thirteen-week trial concluded with four convictions and one acquittal.

The conviction of Robert Mardian was reversed, *United States* v. *Mardian,* 546 F.2d 973 (D.C.Cir.

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[5] Most of the material played at the trial was obtained pursuant to the April 18, 1974 subpoena *duces tecum* and *United States* v. *Nixon, supra.* Other material obtained under the Special Prosecutor's first subpoena *duces tecum* of July 23, 1973, which was enforced in *Nixon* v. *Sirica, supra,* was also played at the trial.

Only those tapes that were actually entered into evidence and played in open court are at issue in this case. Thus this case does not involve all the subpoenaed material which was the subject matter of *United States* v. *Nixon, supra.* The material that was "edited" out of the tapes by Judge Sirica and those tapes in the possession of the Special Prosecutor that were not played at the trial are not of concern here.

1976), and the Special Prosecutor chose not to proceed further against him. The Court of Appeals affirmed the convictions of John Mitchell, H. R. Haldeman and John Ehrlichman, *United States* v. *Haldeman, et al.*, No. 75-1381 (D.C.Cir. Oct. 12, 1976), and this Court refused to review those convictions, *cert. denied*, 45 U.S.L.W. 3764 (May 23, 1977) (Nos. 76-793, 1081).

D. The Applications to Inspect and Copy the Tape Recordings

On September 17, 1974, in anticipation of the beginning of the Watergate Cover-Up trial, Fred Graham of CBS News, Carl Stern of NBC News, and David Schoumacher of ABC News wrote a letter to Judge Sirica requesting, among other things, that they be permitted to copy portions of those tapes played during the course of the trial for use in national news coverage by the electronic media.

On October 2, 1974, Judge Sirica wrote a letter to Graham, denying the request of the newsmen and enclosing a memorandum from Chief Judge George H. Hart, Jr. (A. 9-10). Judge Hart stated that he had consulted with "many of the Judges of this Court" who agreed that the "most troublesome aspect" of Graham's proposal was the fact that the media would be permitted to play "a precise reproduction of what occurred in Court when the tape was played." (A. 10-11).

On November 12, 1974 the three broadcasting companies and the Radio Television News Directors Association—joined later by the Public Broadcasting System—filed a joint application before Judge Sirica claiming a constitutional right to copy the tapes that were being played at the trial. (A. 12-17, 18-21). Because of his involvement in the ongoing trial, Judge

Sirica referred the application to Chief Judge Hart, who in turn referred it to Judge Gesell. (A. 17-18). Judge Sirica ordered the Clerk to assign the application to the miscellaneous civil docket and invited interested parties to respond. (A. 22).

None of the defendants in the trial voiced any objection to the granting of the application. The Special Prosecutor filed a response in which he stated that he did "not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted, and accordingly [the Government] does not oppose the motion." (A. 27-29).

Mr. Nixon opposed the application, arguing that broadcasting the tapes would "have the effect of further intruding on the policies underlying the privilege of confidentiality for presidential communications, of further invading Mr. Nixon's privacy, of further embarrassing him and others . . . and of further invading the privacy and causing embarrassment to persons or groups not participating in the conversations but who are mentioned therein . . . ." (A. 31).

On December 2, 1974, Warner Communications, Inc. filed a separate application claiming that the applicants were entitled to copy the tapes on non-constitutional grounds as well as for constitutional reasons. Referring to the common law and statutory right of the public to inspect and copy court records, Warner argued that the Court had both the power and the discretion to grant the application, that public policy and the public interest strongly favored access, and that there were no substantial reasons to deny the applications. (A. 39-46).

E. Judge Gesell's Rulings

In his Memorandum and Order of December 5, 1974, Judge Gesell upheld the applicants' right to inspect and copy the tapes for release to the public. 386 F. Supp 639 (D.D.C. 1974). According to Judge Gesell, the application did not present valid First Amendment issues but instead posed the "far simpler" question of whether broadcast media along with the general public were entitled "to aural copies of exhibits after they have been received in evidence in a criminal trial as a normal concomitant of the [Sixth Amendment] requirements of a public trial." *Id.* at 641.

Judge Gesell found that the "long standing" custom in the United States District Court for the District of Columbia was to respect the common law right of the public "to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk . . . ." Judge Gesell added that, "Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records." (Emphasis in original.)[6]

In Judge Gesell's view, no "special circumstances" appeared in this case. Mr. Nixon's interest in avoiding embarrassment was insufficiently compelling to defeat the public's traditional right of access, and Mr. Nixon therefore "has no right to prevent normal access to these public documents . . . . His words cannot be retrieved; they are public property and his opposition is accordingly rejected." 386 F.Supp. at 642.

[6] In a footnote, Judge Gesell hinted at the existence of equal protection considerations, stating, "Were this an action in mandamus, rather than an application to instruct the Clerk as to Court policy, the media would have standing to compel equal protection of their right of access consistent with that routinely accorded other members of the public." 386 F. Supp. at 641 n.2.

As to other interests, Judge Gesell noted that none of the defendants in the Cover-Up trial had objected to the release of the tapes, the Special Prosecutor had voiced no objection, and Judge Sirica had not "indicated any reason to deviate from general practice in this instance in the interests of a fair trial." *Ibid.*

Militating in favor of full disclosure was the fact that the Watergate Cover-Up trial was of transcendent public interest and historical importance. "[A] criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust." *Ibid.* Judge Gesell's conclusion was unambiguous. "[T]he aural atmosphere, emphasis and connotations of the taped discussions may be peculiarly illuminating. The law must be applied and the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." *Ibid.*

Judge Gesell did not grant the applicants' request for immediate access to the tapes, however. Because considerable time was required to reproduce the tapes for release, and because court personnel and experts were already fully occupied with the conduct of the Cover-Up trial, Judge Gesell ordered that "[N]o attempt should be made to provide verbatim sound copies . . . until after the trial." *Id.* at 643.

Judge Gesell invited suggestions as to an appropriate method for release, and he listed a number of considerations that the parties should take into account. Special care should be taken to assure that those portions of the tapes not played to the jury were not released to the public. The integrity of the original tapes as they were admitted into evidence had to be preserved. And, since the Office of the Clerk of the Court was not equipped to become involved in any mass release of numerous copies, a responsible agency had to be found which would, without profit or overcommercialization of the evidence, establish a fair and equitable system of distribution, accommodating all categories of applicants without favoritism. *Ibid.*

On December 18, 1974, Mr. Nixon moved to certify Judge Gesell's ruling of December 5 so that an immediate appeal might be taken. Judge Gesell denied the motion on January 6, 1975.

Meanwhile, in response to Judge Gesell's Memorandum and Order of December 5, 1974, the applicants filed a joint proposal with the Court that endeavored to comply with the criteria for release set forth in Judge Gesell's opinion. (A. 47-55). In an order issued on January 8, 1975, Judge Gesell announced that the applicants' proposal was not acceptable. 386 F.Supp. at 643-644. Judge Gesell stated that the applicants' proposal failed to identify a responsible agency or person other than the Clerk of the Court to administer the plan, and that the Court was not equipped with the necessary funds, technology or manpower to undertake the task itself. Judge Gesell also criticized the applicants' proposal for failing to consider ways to minimize commercialization or undignified use of the tapes.

All pending applications were therefore denied without prejudice, and the matter was transferred back to Judge Sirica "for any further action that may be appropriate in the premises at some later date." *Id.* at 644.

F. Judge Sirica's Decision

On April 4, 1975, Judge Sirica entered a Memorandum Opinion and Order which dealt "solely" with "the narrow issue of the timing of the release, if ever, of certain tapes received in evidence in the case of United States v. Mitchell, et al." 397 F.Supp. 186, 187.

Judge Sirica noted that all four of the defendants convicted in the Cover-Up trial had filed notices of appeal. "Absent some compelling reason, the Court should not take any action which carries the risk of causing possible prejudice to the rights of the defendants should a retrial be necessary." *Id.* at 188. Referring to allegations of Mr. Nixon's attorneys that copies of the tapes "would be put to untold varieties of inappropriate and scandalous uses," Judge Sirica concluded that the rights of the convicted Watergate defendants "might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes." *Ibid.* The court thus held that release of the tapes "and any further implementation of the December 5, 1974 Order is *delayed* until the appeals in the *Mitchell* case are decided." *Id.* at 189 (emphasis supplied). The respondents appealed.

G. The Decision of the Court of Appeals

On October 26, 1976, the Court of Appeals affirmed Judge Gesell's decision that the public should be given access to the tapes and reversed Judge Sirica's deci-

sion that access should be delayed until after the appeals of the convicted Watergate defendants had been concluded. 551 F.2d 1252 (D.C. Cir. 1976).

The Court agreed with Judge Gesell that the general right of the public to inspect and copy public records extended to judicial records and that the public's right to inspect judicial records was well established in the District of Columbia. The Court noted that the common law right of access to such records is "not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state." *Id.* at 1258. The Court did not address the applicants' constitutional arguments but recognized that the common law right protected important constitutional interests. The Court specifically referred to certain First, Fifth and Sixth Amendment interests "to underscore the importance of the values that the common law right seeks to protect." *Id.* at 1259.

In response to Mr. Nixon's claim that the tape recordings were not judicial records, the Court said that logic and experience—along with the Federal Rules of Appellate Procedure and the *Manual for the Clerks of the United States District Courts*—indicated otherwise. *Ibid.* The Court acknowledged that exhibits are generally returned to their owners after a case is concluded but observed that that practice has no bearing on whether the public should be given access to exhibits while they are in the Clerk's custody.[7] The Court con-

[7] Actually, the tapes at issue here are not the original tape recordings of presidential conversations, but copies of the originals, which themselves remain in the custody of the Administrator of the General Services Administration. Two copies of the originals were prepared, with inadmissible or irrelevant portions deleted. One copy was provided the Special Prosecutor, and one copy was retained by the trial court. Under respondents' proposed plan for implementing the Court of Appeals decision, a master set of tapes (from which all subsequent public copies would be made) would be prepared by copying from the Special Prosecutor's copy of the White House tapes. The original White House tapes and the copy in the court record would not be touched. *See* App. 3 to Opposition to Petition for a Writ of Certiorari; 551 F.2d, at 1256; A. 24-25 (Affidavit of James F. Davey, Clerk of the District Court); A. 29 n.3 (Memorandum of the Special Prosecutor) (noting that because there was more than one copy of the tapes in existence, duplication procedures would not interfere with the orderly presentation of evidence or threaten the integrity of the original recordings).

cluded that "the common law right to inspect and copy judicial records extends to exhibits." *Id.* at 1260.

The Court observed, however, that the public's right of inspection is not—nor has it ever been considered—absolute. The decision as to when judicial records should be closed to the public "necessarily rests within the sound discretion of the courts, subject to appellate review for abuse." *Ibid.*

The Court found that Judge Sirica had abused his discretion in delaying public access to the tapes. Because the common law right of access may only be abridged when "justice so requires," Judge Sirica misconceived the nature of his discretion when he required the applicants to demonstrate a "compelling reason" for exercising their rights. The Court stated that Judge Sirica should have asked whether Mr. Nixon, "who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records." *Id.* at 1261. The Court of Appeals concluded that "'the *risk* of causing *possible* prejudice' at a *hypothetical* second trial" did not justify infringing the applicants' right to inspect and copy the tapes. *Ibid.*, quoting 397 F. Supp. at 188 (emphasis in original).

After reversing Judge Sirica's decision on the "narrow issue" of "the timing of the release," the Court of Appeals addressed Mr. Nixon's claims with respect to privacy and deference to presidential conversations. Because the tapes had already been played in a public forum, the Court concluded that Mr. Nixon sought to protect something other than an expectation of privacy. It appeared to the Court that Mr. Nixon's real interest was in preventing further embarrassment as a result of increased public access to the evidence of his and his associates' criminal misconduct. This interest, the Court found, was "not a substantial basis for infringing the common law right to inspect judicial records." 551 F.2d at 1263. The Court added that if preventing this kind of embarrassment were a valid interest, it could always be invoked to block the public's right to inspect records in criminal cases. The fact that the transcripts had already received wide circulation minimized the degree of any additional invasion of Mr. Nixon's privacy. Moreover, since the conversations involved "the conduct of the Presidency," they were "impressed with the 'public trust,' and of prime national interest." *Id.* at 1264. The Court of Appeals further held that no executive privilege or deference owed Presidential conversations barred release of the tapes, since their contents were no longer confidential. The Court concluded that Judge Gesell did not abuse his discretion in deciding to permit the public to inspect and copy the tapes. *Id.* at 1264-1265.

Judge MacKinnon dissented with respect to that portion of the opinion dealing with prejudicial publicity and agreed with Judge Sirica that delay in release of the tapes would result in a "significant *reduction* in the possibility of prejudice to a fair trial."

551 F.2d at 1265-1266 (emphasis in original). Judge MacKinnon did not register any disagreement with that portion of the Court's opinion which upheld the fundamental right of the public to inspect and copy the tapes.

H. Warner's Interest in Copying the Tapes

Warner Communications, Inc. is a diversified company principally engaged in the communications business. It is a leading manufacturer of phonograph records and tapes through its subsidiaries, Warner Bros. Records Inc. and Atlantic Recording Corporation, and its Elektra/Asylum/Nonesuch Division. Through a network of branch distribution offices throughout the United States and in many foreign countries, Warner subsidiaries distribute records and tapes all over the world. Warner also produces and distributes motion pictures, television programs, cable television systems, paperback books, magazines and periodicals.

Warner seeks permission to copy the tapes for the purpose of disseminating them to the public by means of phonograph and tape recordings.[8] Shortly after Judge Gesell's decision upholding the legal basis for

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[8] We describe the uses to which Warner intends to put the tapes solely to indicate that there is nothing "undignified" about them; indeed, Warner's proposed uses will serve substantial educational and historical functions. *See* Part II. A *infra*. However, the common law right of access recognized in the District of Columbia does not require any showing by the applicant of a "legitimate interest" or "special interest" in the records requested. *See* 386 F. Supp. at 641 & n.2; 551 F.2d at 1257. Rather, it is a right that may be exercised by *any* member of the public for any reason whatsoever.

its application, Warner publicly announced that it intended to manufacture and distribute two separate sets of tapes. First, Warner would prepare a complete edition of the 22 hours of tape recordings and make them available to schools, libraries and the public without profit. Second, Warner would prepare a two-record edition containing excerpts from the tapes and explanatory narration for sale to the public.[9]

SUMMARY OF ARGUMENT

In Part I of this brief, we demonstrate that the public's common law right to inspect and copy public records extends to official court records, which include exhibits entered into evidence during the course of a criminal trial. As members of the public, the respondents are therefore entitled to inspect and copy those tape recordings of presidential conversations that were played in open court and entered into evidence during the Watergate Cover-Up trial.

In Part II of this brief, we argue that the public's right to inspect and copy these court records protects important constitutional and statutory interests which, in the context of a trial as historically and politically significant as the Watergate Cover-Up trial, supply additional compelling reasons for this Court to enforce the public's right of access.

Granting complete public access to these tape recordings will serve the vital First Amendment interest of

[9] The director of the project for Warner is Michael Kapp, who prepared a previous documentary album entitled "To the Moon." Audio consultant to the project is John G. McKnight, who served as a member of Judge Sirica's Advisory Panel on the White House tapes. The consultant for the narrative text on the two-record set is Walter Pincus.

promoting a fully informed and enlightened public opinion. These tapes were responsible for the pressures that led Mr. Nixon to resign the Office of President in mid-term. Public understanding and acceptance of the unprecedented events surrounding Mr. Nixon's resignation require public familiarity with this evidence.

Granting complete public access to these tape recordings will also serve the critical Sixth Amendment interest of promoting the search for truth and safeguarding the judicial process. These tapes were the principal evidence in *United States* v. *Mitchell,* and were responsible for a former Attorney General of the United States being convicted and sentenced to prison, an event without precedent in American history. Public disclosure of these tapes will explain, justify and validate the verdicts in that case. The American public will be able to hear with its own ears and thereby understand the evidence that decided the fate of some of its highest and most powerful officials.

In addition, release of these materials will advance the objectives of the Presidential Recordings and Materials Preservation Act without short-circuiting or in any way violating the safeguards outlined in that statute.

In Part III of this brief, we argue that the right to inspect and copy exhibits introduced as evidence in open court in a criminal trial is constitutionally mandated by the First Amendment. Thus it may only be abridged for compelling reasons not present in this case.

If viewed as a common law rather than a constitutional right, the right to inspect and copy court ex-

hibits is not absolute, and the Court of Appeals held that it may be denied in particular cases if "justice so requires." The Court of Appeals held, however, that no interest asserted by Mr. Nixon was sufficiently weighty to vitiate the public's right of access to the tapes. In Part IV of this brief, we argue that no public interest or any other broad interest of justice would be served by denying the public access to this evidence.

Release of these tapes will not violate any executive or presidential privilege, which is premised on the need for confidentiality in presidential decisionmaking. These tapes have already been played in open court at a criminal trial, and transcripts of their contents have been released to the public and widely circulated in the press. Any privilege that might once have attached to these materials was lost, waived or forfeited long ago. In addition, these tapes have already been accorded the "high degree of deference" mandated by *United States* v. *Nixon*. All irrelevant or inadmissible portions have been excised, and only those conversations directly related to the crimes involved in the Cover-Up trial remain. Nothing in *United States* v. *Nixon* imposes any restriction on the treatment of these tapes after they have lost the mantle of executive privilege and are introduced into evidence at a public trial, and nothing in that opinion demonstrates any desire on the part of the Court to restrict public access to and knowledge of the contents of the tapes once the privilege has been defeated.

Nor will release of the tapes affect the "fair trial" rights of any criminal defendants. Judge Sirica's concern that release be delayed pending the Watergate Cover-Up appeals has been mooted by this Court's re-

fusal to review those convictions. Mr. Nixon, who was granted a presidential pardon, is in no position even to raise the issue, since his trial rights are not involved. In any event, the Court of Appeals correctly held that there had been an abuse of discretion in delaying release once the trial and sentencings had been completed.

Similarly, no legitimate personal interest of Richard Nixon requires that public access to the tapes be denied. It is now indisputably clear that Mr. Nixon has no property interest in the tapes, and any claim based on his alleged right of ownership must be rejected. Nor will release of the tapes invade Mr. Nixon's privacy. Conversations relating to the conduct of the Presidency—or, as in this case, showing abuses of the powers of the Presidency—may be privileged but they are never private. Even if a privacy interest did attach to these materials, that interest was utterly defeated long ago. Part of the public has already heard the tapes as they were played in the courtroom. Much of the public has already read the contents of the tapes as they were reported in the press. What remains for dissemination is the difference between a transcript and a recording, hardly constituting a significantly more offensive intrusion on the participants' expectation of privacy. In short, the Court of Appeals correctly held that Judge Gesell did not abuse his discretion in deciding to permit the public to inspect and copy the tapes.

It is useful to list those issues that are *not* present in this case:

—The question of who owns the original tapes or the copies in the court's custody is not at issue in this case;

—The question of whether a court is required in all instances to grant the public access to exhibits introduced in open court is not at issue in this case;

—The question of whether the press or the public has a right to record, film, televise, photograph, or in any way electronically reproduce any judicial proceedings is not at issue in this case;

—The question of appropriating copyrighted material or other valuable property interests is not at issue in this case;

—The question of prejudicial publicity infecting future trials is not at issue in this case.

The central issue in this case is whether the narrow personal concerns of Mr. Nixon and his continuing interest in avoiding embarrassment and obloquy for his misconduct as a public official are sufficiently weighty to bar members of the public from exercising their long-standing right to inspect and copy official court records.

ARGUMENT

I. AS MEMBERS OF THE PUBLIC, RESPONDENTS HAVE A LEGAL RIGHT TO INSPECT AND COPY COURT RECORDS, INCLUDING THESE TAPE RECORDINGS.

The tapes at issue here are part of the official public records of the United States District Court. They were received in evidence and played in open court during a public criminal trial. Transcripts of the recordings have received widespread public dissemination. From the time of their introduction into evidence until now, these tapes have not in any sense been "under seal."

The petitioner concedes that members of the public, under common law as well as federal statute, have an affirmative right of access to court records. This precious right has its roots in English law, where tenants of a manor could always inspect the court rolls and books of the manor to ascertain their titles, *Rex* v. *Shelley,* 3 Term R. 141, and where citizens could inspect the books and papers of a borough to determine the limits of a mayor's authority, *Rex* v. *Babb,* 3 Term R. 579. As early as 1635, Lord Coke observed with respect to court records:

> "These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46 E 3."[10]

The public's common law right of access to court records is fully recognized in the District of Columbia. In *Ex parte Drawbaugh,* 2 App. D.C. 404 (1894), the Court of Appeals, quoting Professor Greenleaf's treatise on *Evidence*, stated:

> "'It has been admitted, from a very early period, that the inspection and exemplification of the *records of the King's courts is the common right of the subject* . . . . [A]ny limitation of the right to a copy of a judicial record or paper, when applied for by any person having an interest in it, would probably be deemed repugnant to the genius of American institutions.' . . . [A]nd any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common

[10] Quoted in Annot., Access to Judicial Records, 175 ALR 1260, 1261.

understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." 2 App. D.C. at 406-408 (emphasis in original).[11]

Already deeply entrenched in the common law, the right of the public to inspect and copy court records draws further strength from statutory authority. The maintenance of public court records is provided for by 28 U.S.C. § 753(b), and the right of public inspection and copying of court records has been reinforced by directives of the Judicial Conference issued under 28 U.S.C. § 457.

This Court has frequently recognized that the public policy of the United States strongly favors public knowledge of legal proceedings in courts of record and dissemination of court records by the press. *See, e.g., Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 491-496 (1975), and cases cited therein; *Sheppard* v. *Maxwell,* 384 U.S. 333, 349-350 (1966). As the Court pointed out in *Estes* v. *Texas,* 381 U.S. 532, 542 (1965), quoting Judge Cooley,

> "The law . . . favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned."

A. The Tapes in Evidence Are Court Records to Which the Public's Right of Access Applies.

The courts below have uniformly agreed on the applicability of the public's common law right of access to the materials at issue in this case. In so doing they

[11] *Drawbaugh* is still the law. *See District of Columbia* v. *Baker-smith,* 18 App. D.C. 574 (1901), and, most recently, *United States* v. *Burka,* 289 A.2d 376 (D.C. App. 1972).

have thoroughly rejected Mr. Nixon's contention that the common law right to inspect and copy court records does not extend to exhibits introduced in a criminal trial. In his Memorandum and Order of May 5, 1974, Judge Gesell noted:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records." 386 F.Supp. at 641 (emphasis in original).

The Court of Appeals confirmed Judge Gesell's view:

> "The common law has long recognized a right to inspect and copy public records. In England, the right was narrowly circumscribed, and only a limited number of persons enjoyed it. But the American courts tended to view any limitation as 'repugnant to the spirit of our democratic citizens,' and therefore granted all taxpayers and citizens access to public records. It was the courts' view that 'no sound reason could be advanced for depriving a citizen of his right; for it is evident that the exercise thereof . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service' . . . . [This] common law right to inspect and copy judicial records extends to exhibits." 551 F.2d at 1257, 1260.

Exhibits are classified as "auxiliary case records" in the *Manual for Clerks of the United States District Courts,* §§ 201.1, 201.2(F)(1) (Admin. Off. U.S. Cts. 1966), which was promulgated by the Judicial Conference of the United States under authority of 28 U.S.C. § 457. Thus, exhibits are among "[t]he most important records" in the custody of the Clerk. *Id.* § 201.1. Moreover, "in those cases involving crimes of significance to the history of the country," the *Manual* directs district court clerks to retain on file for public inspection for ten years *a full record* of the case in order "[t]o secure a more complete picture of proceedings . . . ." *Manual, supra,* Ch. 13. Ex. 2, at 2, 16 (1954). (Emphasis supplied).[12]

[12] Both Judge Gesell and the Court of Appeals agreed that the official court record of the Watergate Cover-Up trial was historically significant within the meaning of the *Manual*'s language and that the words "a full record of the case" included the tape exhibits that were entered into evidence during that trial:

> "In this particular instance this general right to have access and copy exhibits is especially reinforced by directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457. The Clerks of Court for District Courts throughout the United States are specifically instructed to retain on file for public inspection for ten years documentation in cases of significant historical importance and then to deposit such materials with the Federal Records Center under the aegis of the General Services Administration for subsequent years under the guidelines set by 44 U.S.C. § 3301 and the implementing regulations appearing at 41 C.F.R. §§ 101-11.101 et seq. Administrative Office of U. S. Courts, Manual for Clerks of United States District Courts, Chapter 13, Exhibit 2, (Ref. 1301.4) at pp. 4-5, item 6(a) (1954), directs, among other things, that 'case papers and documentary exhibits' filed in criminal cases involving the President or officials appointed by the President must not be disposed of even after ten years. Cases of this type are considered to contain 'documentary evidence of movements of historical forces' and 'biographical data' of obvious importance for persons interested in 'social, economic and political research.' *Ibid.*, note to item 6, p. 16." 386 F. Supp. at 641-642; *see* 551 F.2d at 1259.

Further buttressing the *Manual*'s inclusive definition of official court records is Rule 10(a) of the Federal Rules of Appellate Procedure. That provision is entitled "Composition of the Record on Appeal", and it states, in relevant part: "The original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal in all cases." (Emphasis supplied.) Rule 11(a) states: "The record on appeal, *including the transcript and exhibits* necessary for the determination of the appeal, shall be transmitted to the court of appeals . . ." (Empnasis supplied.) And Rule 38(1) of the Rules of this Court provides that "models, diagrams, and *exhibits* of material *forming part of the evidence* taken in a case, and brought up to this court for its inspection, shall be placed in the custody of the clerk. . . ." (Emphasis supplied.)

Mr. Nixon argues illogically that because some court records are not automatically part of the record on appeal, those items which constitute the record on appeal are not necessarily official court records. (Pet. Br. 20 n. 9). But Mr. Nixon points to nothing that might properly be included in the record on appeal that would not also be classified as an official court record. Common sense and elementary logic suggest that the record on appeal is simply a smaller category of items included in the larger and more comprehensive category of official court records.[13]

[13] Mr. Nixon misinterprets *England* v. *Gebhardt,* 112 U.S. 502 (1884). (Pet. Br. 20 n.9). In *Gebhardt,* the Court refused to permit the appellants to include in the record on appeal affidavits that were not part of the record of the court below. *See* 112 U.S. at 505. The case certainly does not stand for the proposition that parts of the "record on appeal" are not "court records."

The cases are also clear that exhibits introduced into evidence are court records. In *Allen* v. *Lackey,* 197 Okl. 513, 188 P.2d 215, 217 (1947), the court said: "Exhibits . . . are a part of the court's records and as such are in the custody of and subject to the control of the court." In *Ex parte Drawbaugh, supra* at 406, the Court of Appeals noted that "all the papers and documents" constituting part of the files in a case "become public judicial records . . . and must be so treated." That definition is certainly broad enough to cover a documentary exhibit such as the tapes at issue here. And in *Sloan Filter Co.* v. *El Paso Reduction Co.,* 117 F. 504, 506 (D. Col. 1902), the court granted public access to court exhibits, stating that "inspecting and taking copies of public records is as old in the law as the records are old." *See also, e.g., Chicago Title & T. Co.* v. *Hagler Spec. Sch. Dist.,* 178 Ark. 443, 12 S.W.2d 881, 883 (1929) (filed depositions are part of court record); *LeClair* v. *New England Tel. Co.,* 294 A.2d 698 (N.H. 1972); *New York Post Corp.* v. *Liebowitz,* 2 N.Y.2d 677, 163 N.Y.S.2d 409, 143 N.E.2d 256 (1957); *In re Delaware County Newspaper Publishers' Ass'n's Petition,* 48 Pa. D. & C. 1 (Pa. C.P. Ct. 1943).

1. Court "ownership" of an item is not a prerequisite to the classification of that item as an official court record.

Mr. Nixon concedes that the public has a common law and statutory right of access to court records but argues that, because exhibits such as the tapes in evidence are not "owned" by the court, they are not "court records." Mr. Nixon criticizes the Court of Appeals for ignoring the "important difference" between materials which actually belong to the court, such as

docket sheets, orders and pleadings, and materials which have been subpoenaed from a third party and belong to someone other than the court, such as the tapes at issue in this case (Pet. Br. 20). He goes further to make the astonishing claim that, even as a matter of discretion, the Court has *no* authority to grant the public access to court exhibits that have been subpoenaed from third parties. (Pet Br. 19, 20-23, 36-37). If adopted, this overbroad and hypertechnical argument would break with clear precedent and established practice.[14]

First, Mr. Nixon has no standing whatsoever to assert any property interest in these tape recordings. *Nixon* v. *Administrator of General Services,* 45 U.S. L.W. 4917 (decided June 28, 1977); *see* pp. 88-90 & n. 75 *infra.*

Second, even if he did have standing to make such a claim, Mr. Nixon can cite no authority for the prin-

[14] Mr. Nixon makes the technical argument that a court has no power to allow inspection and copying of the exhibits in a criminal trial because, like a stolen watch introduced into evidence, they are personal property that must be returned to the owner. That argument may also be answered by a technical response. The tapes that respondents seek to copy are themselves *copies* of the original tapes, which remain in the custody of the Administrator of General Services. The copies were prepared under the aegis of the court, at government time and expense. Even if Mr. Nixon had legal "title" to the original recordings—a proposition that is itself questionable—he does not "own" the physical tapes in the court's possession. And absent any copyright protection—which Mr. Nixon has never asserted—he does not "own" the contents of the copies in the court's possession. In short, the copies of the tapes that respondents seek to inspect and copy *are* the property of the court, not of Mr. Nixon. Thus, even if exhibits that are "owned" by a private party must be returned to that party after the conclusion of judicial proceedings, that principle would not govern the tapes at issue here.

ciple that court *ownership* of an item is a necessary predicate to the classification and treatment of that item as an official court record."[15] Mr. Nixon is similarly unable to cite any authority to support his claim that public access to official court records is restricted to include only those items actually belonging to the court. In fact, the clerk's control over and custody of court records is not premised on any claim of ownership by the court. Nothing appearing in the *Manual for Clerks of the United States District Courts,* for example, even remotely implies that a clerk's power or authority over court records is limited to those materials that are actually owned by the court."[16] What was said in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917, 4922 n.8 (1977) with respect to "the government" certainly encompasses the inherent power of the courts to take all appropriate actions with respect to the materials under their custody and control, as the interests of justice require:

> "It has been accepted at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh,* 9 Fed. Cas.

[15] Mr. Nixon cites a number of cases to support his contention that owners of subpoenaed materials retain their property interest in the materials *after* the completion of grand jury or court proceedings. (Pet. Br. 21-22 & n.11). None of these cases relates to Mr. Nixon's claim that court exhibits are not official court records. None of these cases deals with the treatment of exhibits while in the custody of the court. None of these cases involves any challenge to the power or authority of the court to provide public access to official court records within the custody and control of the court.

[16] The *Manual for Clerks of the United States District Courts* sets forth some twenty-three different categories of court records. §§ 201.1, 201.2(F) and 201.2(G). No distinction is made between material that is actually "owned" by the court and material that is not; all are official court records, including exhibits. One category of court records, for example, is "Bail and other bonds", § 202.1(F)(2), material which is clearly not "owned" by the court.

> 342, 347 (1841), that regardless of where legal title lies, 'from the nature of the public service, or the character of documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers.' [Mr. Nixon's] suggestion that the *Folsom* principle does not go beyond materials concerning national security and current government business is negated by Mr. Justice Story's emphasis that it also extended to materials 'embracing *historical* . . . information.' *Id.* at 347. (Emphasis added.)"

Relying on *United States* v. *Monjar,* 154 F.2d 954 (3rd Cir. 1946), Mr. Nixon argues that the clerk of the court is "a mere custodian" of subpoenaed property and has no right to treat that property "in a manner inconsistent with the private interests retained in that property." (Pet. Br. 22). But, as the Court of Appeals pointed out, Mr. Nixon's reliance on *Monjar* is totally misplaced. In *Monjar,* the court did say that the District Court's possession of books, papers and records "is, at least in one sense, that of a mere custodian." 154 F.2d at 957. But the court went on to emphasize: "In making these statements we do not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court." *Id.* at 958.

The relevant consideration is whether an item is in the control or custody of the clerk, and the rationale of the common law rule applies with as much force to exhibits temporarily in the custody of the court as it does to other court records retained permanently."

[17] Mr. Nixon contends that a court "does not have the right—much less the duty—to retain or dispose of subpoenaed property in a manner inconsistent with the private interests retained in

Simply put, "[T]he public and press have a right to know what goes on in the court room whether the proceeding be criminal or civil." *Florida ex rel. Gore Newspapers Co.* v. *Tyson,* 313 So.2d 777, 793 (Fla. Ct. App. 1975) (overturning the trial court's exclusion of the public from a divorce proceeding involving Jackie Gleason). Exhibits are a critical part of what goes on in the courtroom, and as such are subject to the same common law right of access as are other official court records.

2. The Court of Appeals did not change, extend or expand the right of public access to court records.

Contrary to Mr. Nixon's allegations, the Court of Appeals did not promulgate "an extraordinarily broad construction of the public's right to inspect court records" (Pet. Br. 14), nor did the Court create "a surprising new doctrine" (Pet. Br. 18). In fact, the Court explicitly refused to decide whether the public's right of access to evidence introduced in open court was absolute. 551 F.2d at 1261. Instead the Court observed that "the decision [to close judicial records to the public] necessarily rests within the sound discretion of the courts, subject to appellate review for abuse." *Id.* at 1260.

The court found, however, a presumption in favor of public access to materials entered into evidence dur-

that property." (Pet. Br. 22). If Mr. Nixon is correct, then the courts would be barred even from retaining a copy of documentary exhibits in their permanent files after the close of a case, and the directives issued by the Judicial Conference would be beyond the courts' authority to implement. Indeed, Mr. Nixon's position would require that a court return to the party from whom an exhibit was subpoenaed every copy made of that exhibit; possibly the court would even be under an obligation to retrieve copies of such exhibits from counsel in the case.

ing the course of a public criminal trial which could be overcome only when justice required. The burden was on the party seeking "to interfere with a fundamental common law right" to demonstrate "that justice required denying access to the court records." *Id.* at 1261.[18] As the cases cited by the Court of Appeals indicate, this standard governing the right of access is anything but novel.

The Court of Appeals did not hold, as Mr. Nixon contends, that subpoenaed exhibits are the property of the court. (Pet. Br. 21). Nor did the Court of Appeals hold, as Mr. Nixon contends, that persons responding to subpoenas lose all prior interest in the material they turn over. (Pet. Br. 18). Nor did the Court of Appeals hold, as Mr. Nixon also contends, that a federal district court is *required* in every instance to provide the public with copies of exhibits in a criminal case even if the exhibit materials belong to a third party. (Pet. Br. 18).

In fact, the Court of Appeals arrived at two totally unexceptional conclusions: *first,* that subpoenaed materials which are introduced into evidence as exhibits in a public criminal trial are official court records and therefore subject to the public's common law right of access, and *second,* that the public's common law right of access may be blocked when justice so requires at the discretion of the court, subject to appellate review for abuse.

Mr. Nixon offers a series of hypothetical horribles to support his position that members of the public *never* have a right to inspect or copy exhibits in evi-

[18] The Court of Appeals noted that Mr. Nixon had "not offered a single reason for denying public access to exhibits while they were in the Clerk's custody." 551 F.2d at 1259.

dence, mentioning tapes made from wiretaps and obscene films. (Pet. Br. 15, 35-36). He might have added trade secrets, copyrighted material, and evidence relating to adoption and juveniles generally. To all of these spectres there are two answers. First, they have no relevance to this case. This case involves tapes of statements made by high public officials while in office, which are evidence of a criminal conspiracy and which are material to public understanding of momentous issues concerning the conduct of government. Second, each of the distinguishable problems mentioned above can be dealt with independently on its individual merits. Tapes from wiretaps present no problem because they are covered by statute.[19] The law also makes special provision for the protection of minors in adoption and other cases,[20] and there is extensive statutory regulation of copyrighted material.[21] And, as the Court of Appeals agreed, courts have undoubted power to enter seal orders and other protective orders in the interest of decency, to protect proprietary rights, and for other good and solid reasons.[22]

The opinion of the Court of Appeals was neither broad nor absolute. It involved no great leap forward in doctrine nor did it break with the established practice of the District Court. Instead, it relied on a public right that has been recognized for centuries in Anglo-American law. And the Court recognized that this right, like other common law rights, was hedged by in-

[19] *See* 18 U.S.C. §§ 2510 *et seq.*

[20] *See, e.g.*, D.C. Code §§ 16-311 (adoption); 16-2330 (juvenile cases).

[21] *See generally* Title 17 of the United States Code.

[22] *See, e.g.*, Fed. R. Civ. P. 26(c); Fed. R. Crim. P. 16(c).

herent judicial power to do justice.[23] As to the tape recordings in issue here, the Court simply found that there was no good reason for refusing to apply the common law right, particularly in view of the public character of the transcripts of the tapes.

B. The Public's Right of Access to Court Records Includes the Right to Copy These Tape Recordings.

Mr. Nixon concedes that the public's right of access to court records "requires that the court ordinarily permit inspection *and copying* of court-owned materials." (Pet. Br. 23) (emphasis supplied). The courts have uniformly agreed that "the right to inspect would in many cases be valueless without the right to make copies." *Fuller* v. *State ex rel. O'Donnell,* 154 Fla. 368, 17 So.2d 607, 607 (1944).[24]

But, Mr. Nixon argues, when it comes to public access to court records, the courts "have drawn a sharp distinction between documentary materials and tape

[23] The various hypotheticals posed by Mr. Nixon simply emphasize the virtues of a flexible common law approach to enforcing the public's right of access. The genius of the common law is its capacity for growth and its particularized focus on the facts in the case *sub judice*; the Court of Appeals' opinion is part of the gradual development of a body of case law delineating, in different factual contexts the common law right to inspect and copy public records.

[24] *See also, e.g., Whorton* v. *Gaspard,* 239 Ark. 715, 393 S.W.2d 773 (1965); *State ex rel. Colescott* v. *King,* 154 Ind. 621, 57 N.E. 535, 539 (1900); *Clay* v. *Ballard,* 87 Va. 787, 13 S.E. 262 (1891); *People ex rel. Gibson* v. *Peller,* 34 Ill. App. 2d 372, 181 N.E. 2d 376, 378 (1962).

Moreover, the right to copy includes the right to copy for commercial dissemination. "Such use of the material contained in records often enhances their value to the community." *District Mail Service* v. *Registrar of Motor Vehicles,* 296 Mass. 353, 5 N.E.2d 545, 546 (1937); *Nowack* v. *Fuller,* 243 Mich. 200, 219 N.W. 749 (1928). *See* Part IV.C. *infra.*

recordings." (Pet. Br. 32). Mr. Nixon cites three examples of court-approved limits on public access to tape recordings: first, the practice of restricting public access to the tape recordings of oral arguments in this Court; second, Canon 3A(7) of the Code of Judicial Conduct, which imposes strict limits on "broadcasting, televising, recording or taking photographs in the courtroom"; and finally, the local rules of thirty-nine federal district courts which forbid, *inter alia,* the tape recording of judicial proceedings. (Pet. Br. 32-34).

The examples cited by Mr. Nixon of court-imposed restrictions on the use of tape recording equipment to reproduce judicial proceedings are wholly inapposite to this case. Mr. Nixon ignores the important distinction between tape recordings *of* judicial proceedings and tape recordings of out-of-court conversations which are entered into evidence and played *during* a judicial proceeding.[25] The purpose of prohibiting photographic, broadcast and television coverage of a trial is to ensure that the participants will not be distracted, that the dignity of the proceedings will be maintained, and that the nature of the proceedings will not be dramatized or distorted.[26]

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[25] This distinction is explicitly recognized in Canon 3A(7)(a) of the Code of Judicial Conduct, which provides that "[a] judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom . . . [but] may authorize the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration."

[26] Canon 3A(7)(c)(i) and Commentary, Code of Judicial Conduct.

The policies served by limiting the electronic reproduction of court proceedings are in no way endangered or compromised by granting public access to evidence such as the tapes at issue in this case. As Judge Gesell noted, if the respondents are granted permission to copy these exhibits, "There would be no recording in the courtroom." 386 F.Supp. at 640. The tapes at issue here are recordings of Presidential conversations made many months prior to the beginning of the Watergate Cover-Up trial. The dissemination of these tapes could no more destroy the "dignity of [judicial] proceedings"[27] than could the dissemination of the transcripts of those tapes.[28]

Mr. Nixon argues more generally that the right to inspect recorded materials does not include the right to obtain copies of these materials. No authority whatsoever is cited for the proposition that the common law right of access may be bifurcated, that there may be a right to inspect certain court records but not to copy them. Mr. Nixon cites the restrictions that nine federal district courts have allegedly placed on the tape-recorded notes of official court reporters and suggests that because public access to these particular court records is limited, the respondents, by analogy, should not be permitted to copy the tapes at issue in this case. (Pet. Br. 34-35).

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[27] *Ibid.*

[28] Mr. Nixon's reliance on *Amsler* v. *United States*, 381 F.2d 37 (9th Cir. 1967), is misplaced. In *Amsler*, the trial judge's order restricting photographic, broadcast and television coverage of a trial was held to be "a proper precautionary measure to prevent a recurrence of the *Estes* and *Sheppard* cases." *Id.* at 53. For the reasons stated in Part IV.A.2 of this brief, there is no danger that the publication of these tapes would impair the rights of any of the defendants in *United States* v. *Mitchell* to a fair trial.

First, the practice cited by Mr. Nixon is by no means universal. We know of no federal statute or regulation prohibiting members of the public from copying a court reporter's tape recordings, and most federal district courts apparently have left this question to the discretion of the trial judge. The United States District Court for the District of Columbia has no such ban on copying these recordings, and only a small minority of district courts has adopted such a practice. Indeed, Mr. Nixon has distorted even the practice in the nine cited jurisdictions; in seven, there is no restriction whatsoever on public copying of court reporters' tape-recordings of proceedings, and the only use that is prohibited is their "radio or television broadcast."

Second, the practice has nothing whatsoever to do with the issues in this case. The tapes at issue here, which were introduced as *evidence* in a public trial, are entirely different from a court reporter's recorded notes, which do not play any significant role in the proceeding itself.

Third, where the issue has been posed directly, the courts have held that the right to copy includes the right to copy tapes as well as papers. As the Supreme Court of New Mexico observed, "[t]he right to inspect public records commonly carries with it the right to make copies thereof . . . . We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection, and safety." *Ortiz* v. *Jaramillo,* 82 N.M. 445, 483 P. 2d 500, 501 (1971). For as Judge Gesell stated,

"the public has a right to inspect and *obtain copies* of such judicial records" as exhibits introduced into evidence, 386 F.Supp. at 641 (emphasis in original), and "the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." *Id.* at 642.

Mr. Nixon argues further that the public's right of access to recorded court exhibits places the trial judge "in an unnecessarily difficult position" because, with respect to allegedly pornographic movies or tape recordings of wiretapped conversations, the judge will be torn between the defendant's demand for a public trial and the public's demand for copies of the film or tape. (Pet. Br. 36-37).[29] But *blocking* the public's right to copy court exhibits—which the Court of Appeals noted could be done in particular cases if justice required—does not also require *closing* the trial to the public.

Finally, Mr. Nixon objects to the "heavy" burden placed on persons who might have good reason to object to the dissemination of recorded materials. (Pet. Br. 37). That burden, however, is no greater and no less than the burden placed on persons who seek to restrict public access to printed records. The fact that these exhibits are tape recordings does not *increase* the burden of any person seeking to limit access, and there is no reason why the presumption of public access to tape recorded material should be any less powerful than that accorded to documentary material.

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[29] Of course, the same argument could be made with respect to written exhibits, such as an allegedly obscene book.

In sum, none of the various distinctions Mr. Nixon attempts to draw between tape recordings and documentary materials justifies diluting the right of access to the former.

II. THE PUBLIC'S RIGHT TO INSPECT AND COPY THESE TAPE RECORDINGS PROTECTS FUNDAMENTAL PUBLIC INTERESTS.

The public's right to inspect and copy official court records protects public interests no less precious to a democracy than those guarded by the Constitution itself. As the Court of Appeals observed in its opinion below:

> "This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, 'A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both . . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' Like the First Amendment, then, the right of inspection serves to produce 'an informed and enlightened public opinion.' Like the public trial guarantee of the Sixth Amendment, the right serves to 'safeguard against any attempt to employ our courts as instruments of persecution,' to promote the search for truth, and to assure 'confidence in . . . judicial remedies.' And in the instant case, like the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to Judge Sirica's cramped courtroom the same opportunity to hear the White House tapes." 551 F.2d at 1258 (citations omitted).

These interests are particularly compelling with respect to evidence of criminal activity by high public officials.

A. The Public's Right of Access to Court Records Protects Important First Amendment Interests.

The First Amendment protects "the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964). As former Solicitor General Bork has said, "The core value of the First Amendment to the Constitution is the right of citizens and the press continuously to evaluate their government. That right is meaningful only if they know what their government does and why."[80] Justice Brandeis summed up the constitutional philosophy in his celebrated concurring opinion in *Whitney* v. *California*, 274 U.S. 357, 375 (1927):

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

The same principle of free and robust public discussion about governmental affairs is the foundation of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)

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[80] Interagency Symposium on Improved Administration of the Freedom of Information Act, p. 6 (Department of Justice, Nov. 29, 1973).

and its progeny, under which even false and defamatory statements about public figures, if not published with actual malice, are constitutionally protected.

The tapes sought here are a true and verbatim record of the statements and decisions of public officials. To deny public access to these tapes would be tantamount to withholding from the American people accurate and objective information about one of the most important public events in American history.

1. These tapes are important supplements to the transcripts.

The record contains the affidavits of five persons who listened to the tapes as they were played during the Cover-Up trial, and who have also read the transcripts of the taped conversations. All five are journalists who have specialized in Watergate matters—Hays Gorey of *Time* Magazine, Carol Falk of *The Wall Street Journal,* Glen Elsasser of *The Chicago Tribune,* Finlay Lewis of *The Minneapolis Tribune,* and William J. Eaton of *The Chicago Daily News.* Their affidavits describe numerous specific points on which the tapes are an irreplaceable supplement to the transcripts.

Hays Gorey and Carol Falk give the following examples, among others (A. 76-79, 83-85):

> —Laughter, and phrases like "uh-huh," which are devoid of meaning or ambiguous in the transcripts, have significant meaning on the tapes. The laughter can convey bitterness or good humor. At one point in the trial, John Ehrlichman and James Neal clashed over the meaning of an Ehrlichman "uh-huh." The transcript was ambiguous, but Mr. Ehrlichman's tone of voice on the tape made his meaning unmistakable. Pauses, which are not well noted in the transcripts, can convey on the tapes

> the impact of a statement and a variety of emotional responses.
>
> —Transcripts do not indicate emphasis. For example, in a March 22, 1973 conversation, Mr. Nixon and H. R. Haldeman discuss the possibility that Charles Colson had promised clemency to E. Howard Hunt. At one point, Mr. Haldeman says: "But if Hunt thinks that's what he's been promised . . ." "He'll shut up now," continues Mr. Nixon. Mr. Haldeman responds: "He'll, he *may* shut up now," with an emphasis on "may." As Carol Falk heard the tape, she understood Mr. Haldeman to be saying that Hunt might very well not shut up. That suggestion is important in interpreting Mr. Nixon's subsequent comments.
>
> —In many instances, the transcripts do not show exactly when a statement was made. Simultaneous comments are printed as one statement interrupting another. For interpretive purposes, it is important to know whether a particular statement was really an interruption or rather a simultaneous comment, and whether it was loud enough to have been addressed to the entire group, or was merely an aside, which some of the participants may not have heard.
>
> —The transcripts distort the role of Mr. Nixon. They make him appear tentative and unsure of himself, and give the impression that his subordinates were controlling him. By contrast, the tape recordings present him as firm and very much in charge, at least until sometime in April, 1973 when his voice expresses deep anxiety and he becomes more dependent on his associates, particularly Mr. Haldeman.

Messrs. Eaton, Elsasser and Lewis gave additional examples. (A. 67-72, 73-75, 89-92).[31]

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[31] These affidavits of people who have heard the tapes fully justify

The trial of *United States* v. *Mitchell* involved charges touching the conduct of the government at the highest level and relating to matters of the utmost public importance. Acute public interest in this trial is in no sense tawdry or prurient or sensationalistic, but is instead part of the overwhelming and continuing demand of the public to be fully informed about Watergate. Public understanding of Watergate requires public familiarity with these tapes. As the Court of Appeals observed, "It is conceded that one who listens to the tapes—the inflections, pauses, emphasis and the like—will be better able to understand the conversations than one who only reads the written transcripts that have already been published." 551 F.2d at 1254-1255.

2. These tapes are important sources of oral history which should be available to the public.

Warner seeks permission to copy the tapes for the purpose of disseminating them to the public by means of phonograph records and tape recordings. These

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the conclusion of historian John Hope Franklin:

> "The Watergate trials were, in a sense, a test of the American public's capacity to grasp the full significance of what had transpired at the very highest level of our government. Even in the aftermath of the trials the public cannot know what actually transpired and, thus, cannot reach a satisfactory resolution of the issues involved without access to the same materials, including the tapes, to which the jury itself had access. Free access to the tapes and their free dissemination among interested persons would contribute greatly to the public understanding of the administration of justice at this unusual juncture in our history. The people will decide such matters for themselves; and if their decisions are based on all available evidence they are more likely to reach a sound decision than they would if certain material evidence were denied them." (A. 81-82).

forms of electronic communication are important media for the preservation and dissemination to the public of the sounds of history, as demonstrated by the listing of nearly 150 different documentary records in the comprehensive Schwann Catalogue. On those records, the American public can hear the inaugural addresses of Presidents, the Nixon-Kennedy debates, the United Nations addresses of Pope Paul VI, the voices of Senator Joseph McCarthy, Malcolm X, Winston Churchill and Martin Luther King. And they can hear the sounds of wars, demonstrations, and public ceremonies. Warner's proposed editions of the tapes played at the Watergate Cover-Up trial are in the great tradition of documentary records.

James MacGregor Burns, the Pulitzer Prize winning biographer of Franklin Roosevelt, states in his affidavit, "The utility of oral source materials to historians, biographers, political scientists and other scholars is attested to by the growing number of oral history libraries which have been established, many of which include actual recordings as well as transcripts." (A. 64). Maurice A. Crane, Director of the Voice Library at Michigan State University, testifies to the value of oral history materials to scholars (A. 65-67). The White House Record Library also contains a number of documentary records.

John Hope Franklin is a distinguished historian who was President of the Organization of American Historians and President of the United Chapters of Phi Betta Kappa. He has served on the Advisory Committee of the Oral History Project, and as Chairman of the Committee on Television, of the American Historical Association. In his affidavit, he describes the value of recorded materials for both scholarly work and

teaching. (A. 80-82). Fawn M. Brodie, a biographer of Thomas Jefferson and a Professor of History at U.C.L.A., similarly emphasizes the scholarly and educational value of sound recordings. (A. 59-62).

In additon, the record contains the affidavits of historians and biographers of Presidents McKinley, Wilson, Franklin Roosevelt, Truman and Kennedy. These scholars agree that recorded oral materials are an important source for the study of modern Presidents. (A. 96-98, 93-95, 86-88, 62-65). The historians also agree, on the basis of their research experience, that an edition of the White House tapes relating to the Cover-Up would have immense scholarly value. Professor James MacGregor Burns, a biographer of Presidents Franklin Roosevelt and John Kennedy, comments:

> "The White House tapes played to the jury in *United States* v. *Mitchell* will be of particular importance to historians and biographers because of the peculiar nature of the conversations recorded. It will be recalled that when transcripts of these conversations were released, the conversations seemed somewhat disorganized, fragmented, discursive, jumbled. But it is well known that intelligible conversations may look unintelligible when reduced to formal transcript sequence. I believe that persons listening to the actual conversations would find them far more meaningful than would be possible just from perusing the transcripts. The recordings can capture the interplay of several personalities through means that cannot be made to appear on paper—timing, interruptions, simultaneous comments, communication of emotion through tone of voice, the emotional quality of responses." (A. 64. *See also* A. 95).

There can be no doubt that the First Amendment protects both phonograph records and tape recordings. What the Supreme Court said of motion pictures in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952), applies with equal force to sound recordings:

> "It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."

There can be no question, then, that deference to the public's common law right of access to these particular official court records will also protect vital First Amendment interests.

B. The Public's Right of Access to Court Records Protects Important Sixth Amendment Interests.

Mr. Nixon acknowledges that the Sixth Amendment guarantee of a public trial benefits "the public by encouraging confidence in our judicial institutions, as well as the particular interest of the defendant in guarding against the arbitrary authority which is more likely exercised in private than under public scrutiny. *See In re Oliver,* 333 U.S. 257, 270 (1948)." (Pet. Br. 44).

Nearly a century ago, Mr. Justice Holmes set down the reasons why the law favors the dissemination to the public of information about court proceedings:

> "Though the publication of such proceedings may be to the disadvantage of the particular individual

concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. . . .

"The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley* v. *Pulsifer,* 137 Mass. 392, 394 (1884) (Holmes, J.).

More recently, in *Cox Broadcasting Corp.* v. *Cohn, supra,* this Court underscored the public interests served by the communications media in disseminating court records:

"In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.* Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice. See Sheppard* v. *Maxwell,* 384 U.S. 333, 350 (1966).

". . . The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." 420 U.S. at 491-492 (emphasis supplied).

On many occasions the courts have upheld the right of the public to be informed about and discuss judicial proceedings, thereby serving both First and Sixth Amendment values. *E.g., Bridges* v. *California,* 314 U.S. 252 (1941); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Craig* v. *Harney,* 331 U.S. 367 (1947); *Wood* v. *Georgia,* 370 U.S. 375 (1962); *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U.S. 1301 (1974) (Powell, J., in Chambers); *United States* v. *Dickinson,* 465 F.2d 496 (5th Cir. 1972); *United States* v. *Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974).

The public interest in granting full public access to the court records of *United States* v. *Mitchell* is compelling.[32] Here, as in *Wood* v. *Georgia, supra,* the un-

[32] The public's right to inspect and copy exhibits may be absolutely essential if it is to be fully aware of the basis for a criminal conviction and the legitimacy of judicial proceedings. For example, a document that is the linchpin of the prosecution's case may be identified by a witness, marked as an exhibit and introduced into evidence. Various witnesses may give different accounts of what passages in the exhibit mean, but its actual contents may never be read into the record. If there were no right to inspect and copy

derlying issue "is important not only to an individual or some isolated group or to individual litigants in a particular lawsuit, but affects the entire Nation." 370 U.S. at 392. The trial of *United States* v. *Mitchell* involved the most powerful public officials ever to be brought to trial in the history of the United States. The crimes of which the defendants were convicted involved a conspiracy to obstruct justice through payments of "hush money", perversion of the President's power of clemency, abuse of the President's authority over federal agencies, and other abuses of governmental authority. Now, through the technology of tape recording, the four walls of the crowded courtroom at Constitution Avenue and John Marshall Place can be expanded to include the entire Nation. Full public disclosure of these tapes will explain, justify, and validate the verdicts in *United States* v. *Mitchell*.[33]

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that exhibit, the public—indeed, even those who attend the proceedings themselves—would be unaware of the actual evidence brought into the jury room during its deliberations.

It is also ironic that Mr. Nixon's position might preclude public knowledge of documentary evidence introduced at a public criminal trial while allowing unrestrained dissemination of transcripts of courtroom testimony. Jurors have the exhibits, but not the transcripts of testimony, before them in reaching their verdicts, and every lawyer knows the crucial impact of such exhibits on the outcome of judicial proceedings.

[33] The Sixth Amendment concerns that support the dissemination of the tapes were summarized with striking prescience in *Oxnard Pub. Co.* v. *Superior Court*, 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judges in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or excesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

C. The Public's Right of Access to Court Records in This Case Will Advance the Objectives of the Presidential Recordings and Materials Preservation Act.

This Court has recently upheld the facial validity of the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526 (1974), 44 U.S.C. § 2107. *Nixon* v. *Administrator of General Services*, 45 U.S. L.W. 4917 (June 28, 1977). Title I of that Act provides for archival processing of Mr. Nixon's presidential materials, including tape recordings of White House conversations, and the promulgation of regulations to govern eventual public access to those materials that are not personal and private in nature.[34]

The exhibits that respondents seek to copy are not explicitly covered by the Act, however, since the tape recordings that it governs are the "*original* tape recordings . . ." § 101(a) (emphasis supplied). Respond-

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[34] Such personal and private materials are to be returned to Mr. Nixon. § 104(a)(7).

ents do not seek access to any original tape recordings, but seek to make copies of a *copy* introduced as evidence in a criminal trial. *See* n.7 *supra.* Moreover, § 102(b) provides that notwithstanding any other provision of Title I, "the tape recordings and other materials [covered by the Act] shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpoena or other legal process."[35] Thus the Act does not apply to materials that are already in court, and there is no suggestion in the Act that once subject to legal process, tape recordings would not also be subject to the ordinary incidents of that process, including the publicity resulting from a public trial.[36] Indeed, this Court has observed that access regulations issued by the Administrator under the Act would not be the sole means of public access to the tapes: "Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process . . . ." *Nixon* v. *Administrator,* 45 U.S.L.W. at 4924 n. 13.

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[35] One of the major purposes of the Act was to preserve the availability of invaluable evidence for judicial proceedings. 45 U.S.L.W. at 4919-4920, 4924-4925, 4931.

[36] The Act as a whole relates to the future disclosure of presidential materials that heretofore have not been made public. It simply has no application to presidential materials that are already public. The congressionally mandated machinery for preservation and cataloguing of presidential materials has no relevance to tapes that have already been screened by a court and played in a public courtroom.

Not only does the Act fail to restrict in any way the public's right to inspect and copy presidential materials that become matters of record through criminal trials, it also clearly embodies a congressional judgment that strengthens the public right of access in this case. In § 104(a), which lists seven factors to be considered by the Administrator in fashioning public access regulations, the first factor listed is "the need to provide the public with the full truth, at the *earliest reasonable date,* of the abuses of governmental power popularly identified under the generic term 'Watergate' . . . ." (emphasis supplied).[37] The primary purpose of the Act was "to provide for the American people an historical record of the Watergate events," 45 U.S.L.W. at 4920 n.4; *see id.* at 4924 n.14, which would serve "the American people's ability to reconstruct and come to terms with their history." *Id.* at 4924. The Act will thus help "to restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to [Mr. Nixon's] resignation." *Id.* at 4925. Con-

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[37] In the most recent set of proposed access regulations, the Administrator acknowledges the central role that this provision plays in governing the timing and priorities of public access. *See, e.g.,* Legal Explanation of Public Access Regulations, Presidential Recordings and Materials Preservation Act, P.L. 93-526, at G-6 to G-11 (June 2, 1977).

The other interests to be considered under § 104(a) are either inapposite or satisfied with respect to these tapes. The tapes have been employed in judicial proceedings. § 104(a)(2). National security information was excised by Judge Sirica, § 104(a)(3), and no one's "fair trial" rights are endangered by release. § 104(a)(4); *see* Part IV.A.2 *infra.* The materials are clearly of historical interest, § 104(a)(6), and Mr. Nixon has had more than an ample opportunity to argue, in a judicial setting, that public access should be limited. § 104(a)(5).

and all irrelevant, prejudicial, and otherwise extraneous matter has been excised. The contents of the tapes have been publicly released and widely disseminated. There has been more than adequate opportunity for Mr. Nixon and others to assert any conceivable objection to release of the tapes. In short, no safeguard provided by the Act would be circumvented by prompt release of the tapes. Copying of the tapes for public distribution at the earliest possible time would not only not be inconsistent with the statute, it would carry out the manifest intent of Congress as expressed in § 104 (a)(1).

III. THE RIGHT TO INSPECT AND COPY TAPE RECORDINGS INTRODUCED INTO EVIDENCE AT A PUBLIC TRIAL IS GUARANTEED BY THE FIRST AMENDMENT.

Because of its reliance on the public's common law right to inspect and copy the tape recordings at issue here, the Court of Appeals did not reach the constitutional issues presented. 551 F.2d at 1259. We submit that, in addition to the right of access provided by the common law, the public's right to inspect and copy tape recordings introduced into evidence at a public trial is guaranteed by the First Amendment.[38]

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[38] The First Amendment was peculiarly fashioned to ensure *informed* decisionmaking by the public, the ultimate sovereigns in this Nation. *E.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762-764 (1976); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Information pertaining to the actions of government officials and the conduct of governmental affairs is thus essential, for without that information, it is impossible for the public to effectively and intelligently exercise its sovereign power. *E.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Thornhill* v. *Alabama*, 310 U.S. 88, 95-96, 101-102 (1940); *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). *See*

gress recognized that these interests required that materials pertaining to "Watergate" be promptly made available to the public:

> "Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of 'Watergate' and to provide a basis for legislation and executive action to prevent future 'Watergates' . . . ." H. Rep. No. 93-1507, 93d Cong., 2d Sess. 8 (1974); *id.* at 2. "[L]egislation must be enacted promptly to protect and preserve the papers, documents, memorandums, tape recordings, and transcripts originating during the presidency of Richard M. Nixon in order that all facts about the Watergate affair may be made available to the American people and to the courts, prosecutors, and individuals involved in trials arising therefrom." S. Rep. No. 93-1181, 93d Cong., 2d Sess. 6 (1974). *See also, e.g., id.* at 4.

There can be no doubt that the tapes at issue in this case fall squarely within the materials evidencing "abuses of governmental power popularly identified under the generic term 'Watergate'" under the language of § 104(a)(1). The policy objectives of the Act, Congress' manifest desire to ensure and accelerate public disclosure of presidential materials relating to Watergate, will thus be furthered if the public's right of access is granted now.

It is likely that archival screening will delay release of still-confidential materials for several years. But however long or short the period until the Administrator of the GSA commences release of materials in his custody, there is no need to delay release of the evidentiary tapes at issue here. They have already been screened by the trial court in *United States* v. *Mitchell,*

The controlling precedent is *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), in which this Court, without dissent on the merits, struck down a Georgia statute prohibiting the publication of the name of a rape victim, holding that the right to disseminate material which is part of the public record of a court is protected by the First Amendment. In *Cox Broadcasting,* a television reporter had obtained the victim's name from a public court file. What the Court said about official court records in *Cox Broadcasting* is equally applicable to the tape recordings introduced into evidence in this case:

> "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." 420 U.S. at 495: *see id.* at 491-492, quoted pp. 48-49 *supra.*

Mr. Nixon's attempt to distinguish *Cox Broadcasting* from this case is unavailing. He relies entirely on the statement by the *Cox Broadcasting* Court that it did not address the constitutional questions arising

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generally T. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877 (1963); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Z. Chafee, Free Speech in the United States (1931). As the text demonstrates, information on the criminal justice system is particularly important to self-government, serving both First and Sixth Amendment interests. And if any criminal case merits full public knowledge and discussion of *all* the facts, it is this one, for the Watergate Cover-Up trial involved a core question in any democracy—are public officials accountable for their abuse of the public trust?

from a state policy *refusing any public and press access* to court records. *Id.* at 496 n.26. Whatever the ultimate resolution of those questions, they are of no relevance to this case. For the records at issue in this case, like the records in *Cox Broadcasting,* are completely within the public domain.[39] Far from refusing access to court records, the court below permitted the tape recordings to be played in open court and the transcripts to be distributed to the press and to members of the public in attendance at the trial. This is not a case in which records, for whatever policy reasons, are under seal or shielded from public access *ab initio.*

The principles anounced in *Cox Broadcasting* were recently reaffirmed in *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539 (1976), and *Oklahoma Publishing Co.* v.

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[39] This Court has frequently recognized that the policies of the First and Sixth Amendments strongly favor public knowledge of legal proceedings in courts of record:

> "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.' *In re Oliver,* 333 U.S. 257, 268 (1948). A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' *Craig* v. *Harney,* 331 U.S. 367, 374 (1947). The 'unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society.' *Bridges* v. *California,* 314 U.S. 252, 265 (1941). And where there was 'no threat or menace to the integrity of the trial,' *Craig* v. *Harney, supra,* at 377, we have consistently required that the press have a free hand . . . ." *Sheppard* v. *Maxwell,* 384 U.S. 333, 349-350 (1966). *See* also cases cited pp. 47-50 *supra.*

District Court, 45 U.S.L.W. 3599 (1977). In *Nebraska Press Assn.,* this Court held unconstitutional an order prohibiting the press from publishing certain information tending to show the guilt of a defendant in an impending criminal trial. The Court ruled that the First Amendment required that "once a public hearing had been held, what transpired there could not be subject to prior restraint." 427 U.S. at 568. The following Term, this Court found that *Cox Broadcasting* and *Nebraska Press Assn.* compel the conclusion that "the First and Fourteenth Amendments will not permit a . . . court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." *Oklahoma Publishing Co.* v. *District Court, supra,* 45 U.S.L.W. at 3599.[40] This Court thus struck down a state court order prohibiting the publishing of the name or picture of a minor child in connection with a pending juvenile proceeding. The strength of the First Amendment interests at stake is demonstrated by the Court's refusal to honor the state's expressed interest in the confidentiality of juvenile proceedings, as demonstrated by a state statute that required juvenile hearings to be closed unless specifically opened to the public by court order. The Court found that, although no such court order was issued, once a proceeding was in fact made public, the First Amendment prohibited any restrictions on dissemination of information obtained in that

[40] "[T]he press may not be prohibited from 'truthfully publishing information released to the public in official court records.'" 45 U.S.L.W. at 3599, quoting from *Cox Broadcasting,* 420 U.S. at 496. *See also Craig* v. *Harney,* 331 U.S. 367, 374 (1947) ("[t]hose who see and hear what transpired [in the courtroom] can report it with impunity.").

proceeding. Because Mr. Nixon's asserted interests in restricting access to these tapes[41] can hardly be said to be more compelling than the admittedly valid interests in *Oklahoma Publishing Co.,* that case is dispositive of his claim.

Mr. Nixon further relies on a line of cases in which this Court has refused to create a special right of access for the press. *E.g., Pell* v. *Procunier,* 417 U.S. 817 (1974); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974). That reliance is misplaced.

Pell and *Saxbe* held only that the First Amendment accords the press no greater right of access to inmates of federal and state prisons than it does the general public. That principle is inapplicable here, for this is not a "right of access" case. The tape recordings at issue here are not secret; they are not locked away behind prison walls or kept under seal. Rather, they are part of the public record of the United States District Court for the District of Columbia. Respondents seek only to extend to the general public the opportunity to hear the tapes that have already been heard by a segment of the public—those persons who attended the trial in *United States* v. *Mitchell.* Indeed, the plan submitted to the District Court specifically provides for equal access for *all* members of the public, with no special advantage to the press. The request of respondents is, therefore, wholly different from that of the journalists who sought special access to inmates in *Pell* and *Saxbe,* when that access was not provided to the general public.[42]

[41] See Part IV of this brief.

[42] Moreover, the factual and legal context here is altogether different from that in *Pell* and *Saxbe.* The press claim in those cases

Respondents seek no special "right of access" here. They seek merely to disseminate to the general public truthful "information obtained at court proceedings which were in fact open to the public." *Oklahoma Publishing Co.* v. *District Court,* 45 U.S.L.W. at 3599. This Court's decisions in *Cox Broadcasting, Nebraska Press Assn.,* and *Oklahoma Publishing Company* make clear that the First Amendment guarantees their right to do so."

IV. THE COURT OF APPEALS PROPERLY HELD THAT THERE WAS NO JUST REASON FOR DENYING THE PUBLIC ACCESS TO THE TAPES.

We have argued above that exhibits introduced into evidence in a criminal trial are "court records" that may be inspected and copied by the public. This public right is grounded in the common law, protects fundamental constitutional values and, in the context of the tapes here at issue, derives additional support from a

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was analogous to one under the Freedom of Information Act for information that the government wishes to keep secret. That claim would have required the Court to make, on its own authority, the kinds of public policy decisions which Congress had to make in drafting the Information Act. Here, the guiding principle is simple: it is already established law that the public has a right to inspect and copy the public records of a court, and in this case, the aural public record at issue has already been played to a part of the public.

"The First Amendment right in this case is reinforced by the Sixth Amendment value of public knowledge about a criminal trial. This Court has frequently noted that there is a public right to be informed about and discuss judicial proceedings. *E.g.*, cases cited pp. 47-50 *supra*. That right draws its strength from both the Free Speech and Free Press Clauses of the First Amendment and the Public Trial Clause of the Sixth Amendment. The policy of open government underlying those clauses would be served by recognizing the right to inspect and copy the tapes at issue here.

considered congressional judgment that these materials should be available to the public. Nevertheless, the Court of Appeals acknowledged that the right of access is not absolute, and may be denied in the discretion of the trial court in a particular case if "justice so requires."" In this case, however, the Court of Appeals properly held that there was no just reason for denying the public access to the tapes.

A. No Public Interest Would Be Served By Denying the Public Access to the Tapes.

1. Release of the tapes is entirely consistent with this Court's opinion in *United States* v. *Nixon* and will not violate any executive or Presidential privilege.

Mr. Nixon argues that even if a federal district court generally has discretionary authority to release recorded exhibit materials, it would be "inappropriate" to do so in this case because the tapes at issue are "recordings of confidential presidential conversations"

"The discussion in text will treat the right of access as a common law right that can be limited when "justice so requires"; we demonstrate that the interests advanced by Mr. Nixon cannot even satisfy that relatively relaxed standard for denying access in a particular case. To the extent the public's right to inspect and copy all exhibits and other court records that have been displayed in open court is grounded in the First and Sixth Amendments, the right could obviously be abridged only for *compelling* reasons, and not simply as a matter of trial court discretion. A fortiori, Mr. Nixon has not met that standard. Of course, merely because the right is constitutionally based would not make it absolute. Copyright protection of an exhibit, for example, would still be relevant, as would the obscene or pornographic character of an exhibit. *See Westerman Co.* v. *Dispatch Co.*, 249 U.S. 100 (1919); *New York Times Co.* v. *United States*, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring); *id.*, at 731 n.1 (White, J., joined by Stewart, J., concurring). Mr. Nixon has never asserted any copyright interest in these tapes, and he has conceded that his various privacy and property claims are not constitutionally based.

that are entitled to extremely deferential treatment. (Pet. Br. 47). Judge Gesell held that this concern did *not* justify withholding release of these tapes, 386 F. Supp. at 642, and Mr. Nixon does not assert that Judge Gesell abused his discretion; it thus appears that Mr. Nixon is contending that a trial court can never release presidential communications that once were privileged. Indeed, Mr. Nixon's arguments would apply equally to prohibit the release of written presidential communications received in evidence at a criminal trial. Whether Mr. Nixon's claim is founded on some notion of executive privilege or whether it is based on the argument that release would be inconsistent with this Court's opinion in *United States* v. *Nixon*, there is no legitimate basis for distinguishing these tapes from any other material that is admitted into evidence in a criminal trial and hence subject to the public's right to inspect and copy court records.[45]

In *United States* v. *Nixon*, this Court specifically rejected Mr. Nixon's claim of an absolute privilege for confidential presidential communications. 418 U.S.

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[45] Although the Court of Appeals never addressed the question whether Mr. Nixon, as a former President, could invoke executive privilege, the Court did consider the merits of his privilege claim. It is now clear that Mr. Nixon, as a former President, has standing to assert the privilege with respect to confidential advice received from his presidential aides, *see Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4921, 4923, but the fact that neither President Ford nor President Carter joined that claim "detracts from the weight of his contention" that release "intrudes into the executive function and the needs of the Executive Branch." *See id.* at 4923-4924. In any event, as we demonstrate in text, even if the assertion of the privilege had been supported by the incumbent in this case, the privilege delineated in *United States* v. *Nixon* and *Nixon* v. *Administrator of General Services* would no longer be applicable to these tapes.

at 705, 707. Rather, the Court delineated a constitutionally based, *presumptive* privilege for such confidential presidential communications. That privilege was grounded on "the values to which we accord deference for the privacy of all citizens" and "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making." *Id.* at 708. Pervading the entire opinion in *United States* v. *Nixon* was the theme of *confidentiality*, and it is clear that the constitutional privilege was designed solely to protect the confidentiality of presidential conversations.[46] For without the assurance of confidentiality, the public interest would be compromised because there would be a serious impairment of the decision-making process of the Executive Branch and an unwarranted incursion on the President's Article II responsibilities.[47]

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[46] "[T]he importance of this *confidentiality* is too plain to require further discussion. Human experience teaches that those who expect *public dissemination* of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." 418 U.S. at 705 (emphasis supplied). *See also Nixon* v. *Administrator*, 45 U.S.L.W. at 4923 n.10. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be *unwilling to express except privately.*" 418 U.S. at 708 (emphasis supplied). *See also id.* at n.17 (referring to interest in avoiding "compelled disclosure"); *id.* at 709-710 (analogies to other "privileges against forced disclosure"); *id.* at 710 (noting that the President was challenging the subpoena "on the claim that he has a *privilege against disclosure* of confidential communications") (emphasis supplied); *id.* at 711 (referring to "privilege of confidentiality"); *id.* at 712-713.

[47] These principles have been recently reaffirmed in *Nixon* v. *Administrator of General Services*, where the Court reiterated the qualified nature of the privilege, 45 U.S.L.W. at 4923, and the fact

As the Court of Appeals in this case noted, however, "the tapes played at trial are no longer confidential." 551 F.2d at 1265. They have all been played in open court, transcribed, and admitted into evidence at a criminal trial, and their contents have been widely disseminated to the public. Thus, whatever executive privilege might once have attached to these tapes, it has been lost by waiver or forfeiture.[48] Indeed, in a

that it was fashioned to preserve "confidentiality of communications" in order to ensure candid advice in the decision-making process. *E.g.*, *id.* at 4923 n.10.

> "This Court held in *United States* v. *Nixon*, [418 U.S. 683 (1974)] that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Id.* at 4923. *See generally*, *id.* at 4923-4925.

[48] Moreover, in light of the purpose of the privilege—facilitating a free flow of information within the Executive Branch in the performance of Article II functions—the privilege does not attach to materials unrelated to the performance of executive duties. *United States* v. *Nixon*, 418 U.S. at 703-714. *See also Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4924 ("In [*United States* v. *Nixon*] the Court held that the privilege is limited to communications 'in performance of [a President's] responsibilities,' 418 U.S., at 711, 'of his office,' *id.*, at 713, and made 'in the process of shaping policies and making decisions,' *id.*, at 708.") A fortiori, the presumptive, qualified privilege cannot protect criminal conduct—abuse of Article II power—engaged in by the President. The tapes at issue are evidence of a criminal conspiracy to obstruct justice, in which Mr. Nixon was a culpable co-conspirator, as to which no legitimate privilege can attach. *Cf. United States* v. *Nixon*, 418 U.S. at 709-710; *Nixon* v. *Administrator*, 45 U.S.L.W. at 4921 (analogizing executive privilege to attorney-client privilege, which clearly does not protect "confidential" communications in furtherance of criminal conduct). *See also* 418 U.S. at 712 n.20, where the Court quoted from *Clark* v. *United States*, 289 U.S. 1, 16

rare concession, Mr. Nixon admits that "[i]t is true, as the respondents note, that these conversations are no longer confidential." (Pet. Br. 50).[49]

Whatever the adverse impact that flows from a disclosure of confidential presidential communications, that impact occurred when the tapes were played at a public trial; there can be no further "confidentiality" interest—and thus no "privilege" justification—for suppressing dissemination of the tapes. In *United States* v. *Nixon*, this Court noted that it could not "conclude that advisors will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. It is ludicrous to suggest that advisors would be less candid because of the possibility that tape recordings of their remarks, having been played in open court at a public trial and quoted and described in the press, will also be disseminated by other means. Because the possibility of additional dissemination cannot have any realistic marginal deterrent effect on candid communications from presidential advisors, such incremental dissemination would not threaten any adverse consequences for the values that the presidential privilege is designed to

(1933), on the analogous principles governing petit jury deliberations:

> "A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. *He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor.*" (Emphasis supplied.)

[49] Inexplicably, Mr. Nixon throughout his brief nevertheless refers to the tapes as "confidential" presidential communications.

protect. Thus, the disclosure that has already occurred undermines any rationale for belated application of the "privilege." [50]

Mr. Nixon nevertheless suggests that the tapes that were introduced into evidence should be treated differently than any other evidence introduced in a criminal trial because this Court stated in *United States* v. *Nixon* that the District Court was "'at *all times* [to] accord to Presidential records that high degree of deference suggested in *United States* v. *Burr*.' *Id.* at 715 (emphasis added)." (Pet. Br. 47-48). But that passage continued as follows:

> ". . . and will discharge his responsibility to see to it that *until released to the special prosecutor* no *in camera* material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custo-

[50] Because this case is so unique, candid advice from Presidential assistants will not be chilled by granting complete access to the tapes. It is unlikely, for example, that confidential advice would be voluntarily given a President in permanent aural form—a medium inherently subject to mass public distribution. After all, Mr. Nixon's advisors were not privy to the fact he was surreptitiously recording their every word, and it is, to say the least, ironic for him to argue that public access should be denied because "none of [his close associates] contemplated public airing of his words." (Pet. Br. 50). *See United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293 (1966). It is also unlikely that many presidential advisors would be giving advice that constitutes criminal activity; thus they should not fear the possibility that their communications will become court exhibits in a criminal trial, subject to all normal concomitants of being court records. Finally, it is also unlikely that advisors who permit their advice to be recorded would temper their candor merely because, if that advice becomes a matter of public record, it will do so in the exact form in which it was given.

> dian." 418 U.S. at 715-716 (emphasis supplied). *See also id.* at 706.[51]

To be sure, the Court clearly mandated that extraordinary measures be taken to prevent unwarranted incursions on presidential confidentiality. But this was all in the context of a discussion of the "District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications," *id.* at 714, to determine which materials would remain confidential and which would not. The Court of Appeals recognized that when this Court spoke of the "high degree of deference" commanded by presidential communications, it was referring to the District Court's obligation to *ensure confidentiality* of presidential communications that were either irrelevant or inadmissible in the criminal case. 551 F.2d at 1264-1265.[52] However, once the claimed privilege of confidentiality has been defeated by the needs of justice, and formerly privileged communications have

[51] The Court also stated: "[T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible*, are accorded that high degree of respect . . . ." 418 U.S. at 714-715 (emphasis supplied).

[52] The District Court strictly adhered to this command. As Judge Gesell observed, "Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes *strictly germane to the criminal proceeding* have been played to the jury." 386 F. Supp. at 642 (emphasis supplied).

Mr. Nixon suggests that this case involves "sensitive" presidential material. (Pet. Br. 16). However, all such material had been excised by Judge Sirica. Of course, evidence of criminal activity will always be "sensitive" to the culprits.

been admitted into evidence, there is no reason why they should not be treated like any other evidence. Once the tapes were turned over to the Special Prosecutor they lost their character as privileged presidential material. Once they were admitted as evidence in the criminal trial, they became part of the court record, and thus became subject to all the normal incidents that attach to evidence of record—they were studied by parties to the proceeding, their counsel, and the jury; they were listened to and observed by those members of the public present in the courtroom; they were quoted and reported to the world by the press; and now they may be copied in accordance with the law and the practice of the trial court.

Thus one wonders, in light of Mr. Nixon's concession that the tapes are no longer "confidential" and his implicit recognition that the underlying rationale for the presidential privilege is now inapposite to these tapes, what special prerogative of the Presidency dictates denial of the public's right of access. We are ultimately told that, in the final analysis, Mr. Nixon's "executive privilege" argument is simply that public dissemination of the tapes would be "unwarranted and inappropriate" because it would constitute a "far more serious intrusion on the sensibilities" of those whose voices appear on the tapes than would publication of the transcripts or reports of their contents. (Pet. Br. 50). But if *United States* v. *Nixon* stands for anything, it is the principle that the President is not above the law. The fact that his "sensibilities", or those of his close associates,[53] would be offended by disseminations of conversations evidencing criminal conduct and breach of the public trust, is no different than would be true in any "ordinary" criminal case.[54] And to the extent the participants in these conversations have been made "unwilling actors," (Pet. Br. 50), they have been made so by Mr. Nixon, not the public.[55]

[53] Other than Mr. Nixon, none of the participants in any of the taped conversations has asserted any privacy or privilege objections to release of the tapes.

Mr. Nixon states that it is "hardly necessary . . . to review here the content of the recordings at issue" and suggests that the Court "[put] aside the substance of the conversations as they relate to the Watergate affair." (Pet. Br. 49). But the content of those tapes cannot be ignored, for their content was the very reason the presumptive privilege was lost.[56] As Judge Gesell stated:

[54] We discuss in greater detail below Mr. Nixon's claim that personal rights to privacy would be violated by public dissemination of these tapes. Whatever the merit of those claims, they do not attach because of any special presidential or executive privilege.

[55] Mr. Nixon states that "the respondents seek to make the participants in these private conversations unwilling actors in their broadcasts and phonographic productions." Of course, these "private" conversations, surreptitiously recorded by Mr. Nixon, were a criminal abuse of the public trust by high government officials. That criminal activity was the reason the tapes were played in a public trial, and the need for public understanding of that abuse of the public trust renders public access more imperative in this case than in an "ordinary" criminal trial. Certainly the participants in these conversations had more of an opportunity to keep their advisory activities "private" by remaining within the confines of the law than did the rape victim whose name could no longer be considered private in *Cox Broadcasting Corp.* v. *Cohn*, *supra*.

[56] Mr. Nixon attempts to treat executive privilege in the abstract, as if these tapes were still confidential and the criminal nature of the communications was still secret. But although the privilege of executive confidentiality may be more resistent to loss or forfeiture than other common law or constitutional privileges, it is

> "Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comments relating to persons not on trial. Only portions of the tape strictly germane to the criminal proceeding have been played to the jury." 386 F. Supp. at 642.

And as the Court of Appeals noted:

> "[W]e deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed." 551 F.2d at 1263-1264.

Indeed, the tapes were the main evidence at the Watergate Cover-Up trial; "actual tape recordings of key conversations of the co-conspirators . . . established a wide-ranging conspiracy designed to impede a grand jury investigation. . . ." *United States* v. *Haldeman, et al.*, No. 75-1381, Slip op. 6 (D.C. Cir. Oct. 12, 1976). The conspiracy "amounted to an unprecedented scandal at the highest levels of government," and the indictment named Mr. Nixon as a co-conspirator in this obstruction of justice. *Id.* at 3-4 & n.2." *See generally,*

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still subject to forfeiture. Once the privilege is lost, as in this case, it can no longer serve as a justification for preserving confidentiality and preventing additional dissemination.

[57] "The conspiracy at issue required the coordination and control of a large number of individuals who had knowledge of the events that were being covered up. It also required the conspirators to make regular strategic decisions on how best to proceed to prevent the full story of 'Watergate' from becoming known to the press, prosecutors, Congress, and the public. The tape recordings thus contain discussions of many aspects of Watergate strategy: what would happen if particular individuals were to talk, *e.g.*, Tape Tr. 195, how much knowledge those individuals possessed, *e.g.*, Tape Tr. 306, who was likely to volunteer or be compelled to talk, *e.g.*, Tape Tr. 213-214, 306, 310, what individuals could be dissociated from any responsibility for reprehensible or illegal activity, *e.g.*, Tape Tr. 147, 265-267, 303, 458-459, whether certain officials should assert executive privilege, *e.g.*, Tape Tr. 193-194, whether public statements should be issued and what they might contain, *e.g.*, Tape Tr. 57, whether it was feasible to raise and distribute hush money; *e.g.*, Tape Tr. 131-132, 179, 189-191, whether promises of money or aid had been extended to particular persons, *e.g.*, Tape Tr. 325, and so forth, *see e.g.*, Tape Tr .64, 72, 82, 86, 89-91, 130, 135, 311." *United States* v. *Haldeman*, *supra*, slip op. 134-135.

id. at 3-22. The tapes are thus evidence of criminal misconduct by the public's servants and are "both impressed with the 'public trust' and of prime national interest." 551 F.2d at 1264. Having lost the mantle of executive privilege, the tapes are now entitled to no special protection because of their origins. Indeed, given the content of the tapes and the light they shed on the conduct of the Presidency, there is an even more compelling need than in the ordinary criminal case for the public to exercise its right to inspect and copy these tapes.

Finally, with respect to a claim of executive privilege, it is irrelevant that some parties who will gain access to the tapes, including respondent Warner Communications, will market them. Every time the President makes a public announcement or reveals documents publicly, they become subject to the "commercial" aspects of the free enterprise system. The same

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Mr. Nixon also admits that the "tapes were perhaps the most critical evidence in the criminal case." (Pet. Br. 54).

is true of any material revealed in a public trial.[58] In any event, respondents seek to vindicate the right of every person to obtain a copy of these tapes directly from the court. Whether any particular cause of action, grounded in privacy considerations or otherwise, can be brought against those who republish the tapes is not at issue in this case.[59]

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[58] Because Mr. Nixon has reaped such handsome profits from his abuse of public office and breach of the public trust, he has no legitimate moral standing to cast aspersions on the motives of those who, in marketing the tapes, will at least provide the public with an accurate and truthful version of their contents.

[59] In making his "executive privilege" argument, Mr. Nixon contends that release is sought for the "entertainment of the American public," (Pet. Br. 50); that respondents seek to "exploit" presidential conversations for commercial purposes, *id.* at 15; *see id.* at 50 (release would be "commercial exploitation of the presidential conversations"); and that release entails "undignified commercial exploitation," *id.* at 49. These claims seriously distort the issues actually involved here, for the Court of Appeals simply held that *any* member of the public has the right to obtain a copy of the tapes *directly from the court*, that distribution by the court must be "on an equal basis to all persons desiring copies," and that "neither the court, nor any agent it appoints, should profit from the public's exercise of its common law rights." 551 F.2d at 1265. Moreover, the purpose of release is not public "entertainment," but public enlightenment about Mr. Nixon's abuse of the power of the Presidency; release will facilitate "the American people's ability to reconstruct and come to terms with their history" and "a full airing of the events leading to [Mr. Nixon's] resignation." *See Nixon* v. *Administrator of General Services*, 45 U.S.L.W. at 4924-4925. This is surely neither "exploitation" nor "undignified." In any event, "commercialization" would be an unconstitutional basis upon which to deny the public's rights. *See* Part IV.C. *infra*.

Whether Mr. Nixon has any claim against particular republication of the tapes is not now at issue. But respondent's proposed records will neither be exploitive nor undignified, and will serve as an appropriate historical record of this sad chapter in the life of our Republic. *See* pp. 17-18, Part II.A. *supra*.

2. Release of the tapes will not interfere with the public interest in ensuring fair criminal trials.

In denying the public's common law right to *immediate* access to the tapes,[60] Judge Sirica primarily relied on the possible deleterious impact of release on the rights of the defendants in the Watergate conspiracy case should a *retrial* become necessary for the already-convicted defendants.[61] Indeed the timing of release

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[60] To the extent the right of access is constitutionally based, and to the extent the common law right protects First Amendment values, the delay was particularly egregious. This Court has emphasized, in a plethora of opinions, that the public interest in an informed and enlightened public opinion requires prompt release of information. *E.g.*, *Carroll* v. *Princess Anne*, 393 U.S. 175, 182 (1968); *Wood* v. *Georgia*, 370 U.S. 375, 392 (1962); *Pennekamp* v. *Florida*, 328 U.S. 331, 346-347 (1946); *Bridges* v. *California*, 314 U.S. 252, 268-269 (1941); *International News Service* v. *Associated Press*, 248 U.S. 215, 235 (1918); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 157 (1967) (plurality opinion of Harlan, J., joined by Clark, Stewart, and Fortas, JJ.). *See also*, *New York Times Co.* v. *United States*, 403 U.S. 942 (1971) (expedited procedures in case involving prior restraint on publication); *cf. Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975). For as the Court has recently reiterated, "the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 561 (1976). *See also id.* at 609-610 n.39 (Brennan, J., joined by Stewart and Marshall, JJ., concurring); 423 U.S. 1327, 1329 (1975) (In-Chambers opinion of Blackmun, J.).

[61] Judge Sirica also commented on the need to protect the integrity of any evidence to be used in a retrial. Judge MacKinnon, dissenting in the Court of Appeals, voiced similar concerns. However, no such concern was remotely apposite to this case in light of the existence of duplicate copies of the tapes. *See* n.7 *supra*. Since the copying was to be done from the Government's *duplicate* set of tapes, there could be no interference with the record on appeal in the criminal case, or any possible impairment of the evidence to be used in any retrial. Moreover, the affidavit of James F. Davey, Clerk of the District Court, clearly indicated that the copying of the tapes could be done without any disruption of the processes or business of the District Court. (A. 23-27).

was the only issue before Judge Sirica, for Judge Gesell had already ordered that there was a public right to copy the tapes, and that no interest asserted by Mr. Nixon overcame that public right. The Court of Appeals held that Judge Sirica's denial of immediate public access was an abuse of discretion in the circumstances of this case and Mr. Nixon, in seeking certiorari, argued that the Court of Appeals' ruling constituted an abridgment of a trial judge's discretion "to delay any release of the recordings until the appeals in the criminal case and any necessary retrials of the defendants were concluded." (Pet. Writ Cert. 3). In his brief on the merits in this Court, Mr. Nixon no longer presents this as a separate question for review, although he makes a passing argument based on the premise that "because the opinion of the court of appeals gave such hostile treatment to the trial judge's efforts to reduce the risk of prejudicial publicity in a criminal trial, this Court must not allow that precedent to stand, even if the risk of prejudice has now passed." (Pet. Br. 56). Thus Mr. Nixon concedes that the question of undue "pretrial" publicity in the event of Watergate Cover-Up retrials is no longer presented in this case.

Whether the release of exhibits from a criminal trial might prejudice any prospective retrial of the same criminal defendants is obviously only a question of timing—*when* the exhibits should be released, not a question of *whether* they should be released. That question is now moot. The Court of Appeals affirmed the convictions of three of the four defendants in the Watergate Cover-Up trial, *United States* v. *Haldeman, et al.*, Nos. 75-1381, 1382, 1384, 1441 (D.C. Cir. Oct. 12, 1976) (*en banc*), and this Court has denied the defendants' petitions for writs of certiorari. 45 U.S.L.W. 3764 (May 23, 1977). Those convictions are thus final, and the defendants have begun to serve their prison terms. Moreover, the Government decided not to reprosecute Mr. Mardian, the sole cover-up defendant whose conviction was reversed by the Court of Appeals. *See* Government's Motion to Dismiss Indictment, *United States* v. *Mardian*, Cr. No. 74-110 (D.D.C. January 17, 1977). Therefore, there is no realistic prospect of any retrials, and the issue of prejudicial "pretrial" publicity—whether release of the tapes should have been delayed while the cover-up case was pending on appeal—is moot.

In any event, Mr. Nixon has no standing to raise the issue of prejudicial pretrial publicity. He was not a party to the criminal case; nor was he a prospective defendant, in light of the pardon granted him by former President Ford. He has admitted that he has "no direct interest in the criminal case," (Pet. Writ Cert. 9 n.3), and this case surely has none of the features that sometimes justify the assertion by one party of the rights of others. *See, e.g., Singleton* v. *Wulff*, 428 U.S. 106, 112-116 (1976); *id.* at 123-127 (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in part and dissenting in part); *Warth* v. *Seldin*, 422 U.S. 490, 498-501 (1975). None of the Watergate Cover-Up defendants sought review of the Court of Appeals opinion, and all have declined to remain parties to the case in this Court. *See* letter of April 29, 1977 from counsel for Mr. Nixon to all trial counsel in the Watergate Cover-Up case; letter of May 12, 1977 (and attached certificate of service) from counsel for Mr. Nixon to the Honorable Michael Rodak, Clerk, Supreme Court of the United States. Moreover, al-

though at all times represented by extremely able, retained counsel who were served with all papers in this proceeding, including papers pointing out their failure to oppose the applications for copies of the tapes,[9] none of the Watergate defendants raised the issue of prejudicial publicity in the District Court. And although Mr. Haldeman raised the issue in the Court of Appeals, he did so in a *pro forma* one-sentence statement (*see* A. 99), to which the Court of Appeals rightly paid little attention. Finally, the Special Prosecutor has never opposed release of the tapes. Since the only parties whose "fair trial" rights could be affected saw no need to contest release of the tapes, Mr. Nixon cannot be heard to assert their rights.

Even if Mr. Nixon had standing to raise the issue of prejudicial publicity, and that issue were not moot, the Court of Appeals would be correct on the merits of its holding that Judge Sirica abused his discretion in delaying release of the tapes pending the Watergate Cover-Up appeals. As that Court noted:

> "[T]he very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling. If the chance of a retrial justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted." 551 F.2d at 1261 (footnote omitted).[10]

[9] Indeed, the defendants' counsel were even invited by the District Court to appear at the status call on March 6, 1975.

[10] The Court added that a "portion of the news value of such materials may be irrevocably lost by even a temporary delay." 551 F.2d at 1262 n.42. Over 32 months have elapsed since some of the respondents first applied formally for permission to inspect and copy the tapes.

Such open-ended time limits on public access to court records are intolerable. The overwhelming consensus of legal and judicial opinion is that restrictions on the release to the public of information concerning a criminal case should end at the conclusion of the trial or, at the very latest, at the conclusion of sentencing. *See, e.g.*, American Bar Association, Standards Relating to Fair Trial and Free Press (Tentative Draft, Dec. 1966 and Supplement, Mar. 1968) (Reardon Committee Report); Committee on the Operation of the Jury System, Report on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) (Kaufman Committee Report); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations (1967) (Medina Committee Report); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962); Local Rule 1-27 of the U.S. District Court for the District of Columbia.

Finally, even if access to judicial records could sometimes be denied on the grounds of potential prejudice to a hypothetical retrial, the Court of Appeals gave cogent reasons why that risk did not justify denying access under the circumstances of this case. First, the Court of Appeals noted that the defendants' silence evidenced a belief that their rights would not be jeopardized, and it observed that "their inaction surely would weigh against them were they later to challenge the impartiality of veniremen or jurors based upon exposure to the tapes." 551 F.2d at 1263. All defendants had ample opportunity to make their views known, but neither they nor their able retained counsel chose to do so. There is clear prece-

dent that the failure of a criminal defendant to take obvious steps to mitigate problems of publicity gravely weakens any argument that he was denied a fair trial by reason of prejudicial publicity. *E.g., Stroble* v. *California,* 343 U.S. 181, 193-194 (1952); *United States ex rel. Darcy* v. *Handy,* 351 U.S. 454, 463 (1956); *Beck* v. *Washington,* 369 U.S. 541, 557-558 (1962).[64] Second, the Court of Appeals noted that the evidence in question was "tape recordings from which inadmissible statements have been carefully eliminated" and which "presumably will be replayed at any retrial." 551 F.2d at 1262.[65] Such evidence poses less of a threat of prejudicial publicity that would infect the impartiality of a jury. *E.g., Stroble* v. *California, supra.* Third, the District Court placed no restrictions on release of any evidence during the trial, and the transcripts were made available to the press and public. As the Court of Appeals noted, the "transcripts of these conversations have received wide circulation and have been reenacted in various forums." 551 F.2d at 1262. The District Court's position thus essentially amounted to the argument that prospective jurors could read the evidence but could not hear it, a position that makes

[64] The Special Prosecutor, representing the interests of the United States, declined to object to release of the tapes both at the District Court and at the Court of Appeals. (A. 28-29 & n.3, 101).

The Special Prosecutor specifically observed that he

> "does not foresee that the rights of the defendants or the United States to a fair trial would be jeopardized if the motion [to grant respondents access] is granted, and accordingly does not oppose the motion." (A. 28-29).

[65] "Appellants are not seeking access to an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury." 551 F.2d at 1262.

very little sense. Finally, the Court of Appeals noted that it seemed "likely that, without undue effort, it would be possible to empanel a jury whose members had never even heard the tapes." *Id.* at 1262 n.46. The court noted that an impartial jury had been empaneled in the original cover-up trial, *see United States* v. *Haldeman et al.,* No. 75-1381, slip op. 22-48 (D.C. Cir. Oct. 12, 1976), despite the phenomenal and widespread publicity engendered by the whole "Watergate affair" over the preceding years.[66] *See Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 554 (1976).

Thus, on the record in this case, it is unnecessary and inappropriate for this Court to consider the question of the permissibility of delaying, pending appeal, release of exhibits after a criminal trial has been completed and the defendants have been sentenced. That was the sole issue on which the Court of Appeals found any abuse of discretion by either District Court Judge. In any event, on the merits of that question the Court of Appeals was fully justified in reaching the conclusion that it did.

[66] Massive publicity surrounded the original "Break-In Trial" and the "Ellsberg Break-In Trial", the televised Ervin Committee hearings, litigation involving subpoenas of various White House tapes, televised statements by then-President Nixon, the televised deliberations of the House Judiciary Committee and its vote to impeach Mr. Nixon, and the resignation of Mr. Nixon shortly before trial. Moreover, there have been countless best-selling books, newspaper and magazine articles, and television and radio programs about various aspects of the Watergate affair. The Cover-up trial itself generated additional massive publicity. All of this publicity not only reflects the public interest in "Watergate," but also highlights the comparatively insignificant additional publicity that release of the tapes will generate. If a fair and impartial jury could be empaneled at the first trial, there was no realistic danger that release would prevent the empaneling of another such jury in the event of any retrials.

B. No Legitimate Private Interest of Mr. Nixon Would Be Served by Denying the Public Access to the Tapes.

1. Release of the tapes will not invade Mr. Nixon's right to privacy.

Mr. Nixon claims that he retains a privacy interest in the taped conversations that would be infringed if aural copies of the conversations were publicly distributed (Pet. Br. 26-31). He cites no constitutional, statutory or District of Columbia common law basis for his privacy claims, and his assertion that distribution of the tapes would invade his privacy was rejected by both Judge Gesell and the Court of Appeals. We suggest that there are at least three bases for rejecting Mr. Nixon's privacy claims. First, no personal privacy interest of Mr. Nixon could attach to these tapes, since they constitute recorded transactions of government business conducted by public officials. Second, any privacy interest that Mr. Nixon may once have had in these tapes was clearly lost when they were played in open court in a criminal trial, and when their contents received widespread public dissemination. Third, even if Mr. Nixon now retains some vestigial privacy interest in the tapes, the Courts below did not abuse their discretion in holding that any such interest was not so significant as to justify a denial of the public's right of access in this case.

The tapes at issue in this case are not subject to a claim of personal privacy. During his incumbency, a President is the quintessential public figure, who by voluntarily seeking public office relinquishes any privacy interest in the manner in which he conducts himself in office and in his "use or abuse of [the] public trust." *Sanitation Men* v. *Sanitation Commissioner,* 392 U.S. 280, 284 (1968). Oval office conversations

among public officials and concerning public business may sometimes be privileged, but outside the confines of privilege they are never "private." This principle was clearly recognized as recently as last month in *Nixon* v. *Administrator of General Services, supra,* where the Court upheld the facial validity of the Presidential Recordings and Materials Preservation Act against Mr. Nixon's various challenges, including his claim that the Act invaded his privacy interests. The Court observed that there could be no "privacy" claim as to tape recordings that "related to [Mr. Nixon's] conduct of his duties as President, and [which] were therefore materials to which great public interest attached." 45 U.S.L.W. at 4925.[87]

[87] The Court also observed that "at least when government intervention is at stake, public officials, including the President, are not *wholly* without constitutionally protected privacy rights *in matters* of personal life *unrelated to any acts done by them in their public capacity.*" 45 U.S.L.W. at 4926 (emphasis supplied). The Court gave as examples "matters concerned with family or personal finances," *Ibid.*; Mr. Nixon might have a "legitimate expectation of privacy in *such* materials." *Ibid.* (emphasis supplied). The Court further commented:

> "*The overwhelming bulk of* the 42 million documents and *the 880 tape recordings pertain,* not to [Mr. Nixon's] private communications, but *to the official conduct of his Presidency.* . . . [I]t is logical to assume that the tape recordings made in the Presidential offices *primarily relate to the conduct and business of the Presidency.* And, of course, *appellant cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public.*" (Emphasis supplied.)

As to these "official materials," in contrast with certain "extremely private communications," there can be no valid claim to privacy. *Ibid.* Indeed, there is more than a mere "assumption" that the tapes introduced at the Cover-Up trial relate to the conduct of the Presidency; any reading of the transcripts makes clear beyond peradventure that they reveal a flagrant abuse of the powers of that Office.

The fundamental lesson of Watergate is a democratic lesson: good government is open government, deriving its legitimacy from the informed and enlightened consent of the governed. Public knowledge is an indispensable element of good government under our Constitution. The Constitutional faith is that the people can be trusted with information. When that information reflects the manner in which public officials execute their public trust, it cannot be deemed to be private. The tapes at issue here were found by Judge Sirica to be relevant and material to criminal charges involving alleged misuse of public office by the highest officials in the land. As such, the tapes are peculiarly appropriate for *public* concern and discussion.

In any event, whatever privacy interest may once have adhered to the content of these tapes has been utterly lost. They are evidence of record in a criminal

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The theme that there is no personal privacy interest in materials relating to the conduct of the Presidency was repeated later in *Nixon* v. *Administrator*. "[T]he vast proportion of [Mr. Nixon's] Presidential materials are official documents or records in which [he] concedes the public has a recognized interest." 45 U.S.L.W. at 4927. Thus, although Mr. Nixon "has a legitimate expectation of privacy in his *personal* communications," there is no such expectation with respect to materials bearing on his conduct of the Presidency. *See id.* at 4928. *See also id.* at 4925 (distinguishing "communications relating to governmental duties, and of great interest to historians or future policymakers, [from] private and confidential communications"); *id.* at 4933 and n.* (White, J., concurring) (Mr. Nixon's personal property is property "not involving the actual transaction of government business"; the government would not view as private "the tapes, which actually recorded the transaction of government business by government employees on government time and so on").

trial involving official crimes and abuse of power."[88] The tapes have been published to the world. Their content has been extensively reported in the press, and transcripts may be reprinted or reenacted without limit. As the Court of Appeals noted, "Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum." 551 F.2d at 1263. Part of the public has already heard the tapes in the courtroom. What remains for dissemination to the rest of the public is the difference between a transcript and a recording: voice, inflection, and timing. No privacy interest attaches to such elements. *E.g., United States* v. *Dionisio*, 410 U.S. 1, 14 (1973).[89] In light of the fact that the *content* of Mr. Nixon's conversations has been released to the public, he has no interest recognized by the law of privacy in preventing the most accurate and effective public presentation of that content—from copies of the tapes themselves.

Mr. Nixon acknowledges that his asserted privacy interest is not one of confidentiality, since this has

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[88] Public dissemination of matters of public record is not an invasion of privacy. W. Prosser, *Handbook of the Law of Torts*, at 810-811 (4th ed. 1971). This principle was reaffirmed by this Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 489-495 (1975).

[89] *Doe* v. *Roe*, 33 N.Y. 2d 902, 307 N.E. 2d 823 (1973), *aff'g* 42 App. Div. 2d 559, 345 N.Y.S. 2d 560, *cert. dismissed as improvidently granted*, 420 U.S. 307 (1975), which Mr. Nixon cites for the proposition that prior publicity does not vitiate privacy interests, is clearly inapposite. That case involved a private plaintiff, not a public official, and the defendant-author was a psychiatrist who was alleged to have breached statutorily-recognized psychiatrist-patient confidentiality. Moreover, the injunction only issued *pendente lite*. In this case, there is no claim that those who seek access to the tapes have engaged in any wrongdoing.

clearly been lost. (Pet. Br. 27).[70] Rather, he objects be-

[70] Mr. Nixon also recognizes that any "privacy" interest that he has in the tapes would be an insufficient basis to win a tort suit for invasion of privacy at common law. (Pet. Br. 29-30; *see* 551 F.2d at 1263).

This Court's recent opinion in *Zacchini* v. *Scripps-Howard Broadcasting Corp.*, 45 U.S.L.W. 4954 (1977) is clearly inapplicable to this case. In *Zacchini*, the Court held that the First Amendment did not immunize a television station from a tort action, grounded in a State law "right to the publicity value of [a] performance," for damages that may have resulted when it broadcast the "entire act" of an "entertainer" who ordinarily is paid to perform, without obtaining his consent. In this case, Mr. Nixon does not point to any local statutory or common law recognition of a "right of publicity."

More importantly, the interest protected in *Zacchini* was "the proprietary interest of the individual in his act in part to encourage such entertainment"; it focused on "the right of the individual to reap the reward of his endeavors" and "the economic value of that performance," and "did not intrude on dissemination of information to the public" because "[a]n entertainer such as [Zacchini] usually has no objection to the widespread publication of his act as long as he gets the commercial benefit of such publication." *Id.* at 4956-4957. By contrast, Mr. Nixon—a public official charged with public responsibility and accountable to the citizenry, rather than an entertainer engaged in commercial endeavors— has invested no special time, energy or expense in the sound of his voice, and dissemination of the tapes will in no way deprive him of his earning capacity. Indeed, unlike the performance in *Zacchini*, these tapes were never made for the purpose of commercial dissemination. When an individual assumes the Presidency—or any public office—he cannot be deemed to have a compensable interest in his governmental acts; his official salary and possibly the prestige of his office are all that are necessary to compel him to engage in official duties, and no further "economic incentive" should be tolerated. A President cannot, for example, object to the taping and filming of a press conference and its subsequent distribution, even if done for a profit. The tapes at issue in this case are no different; they are verbatim records of official government business. Since they were transacted in confidence, they may have been originally invested with a claim of executive privilege. But absent any valid claim of privilege, the record of an official act is not private property for which a public official can command compensation. At a minimum, it should be

cause dissemination of the recorded conversations would not be "inoffensive." *Id.* at 28. Essentially, Mr. Nixon fears embarrassment from further dissemination of the tapes. Yet that embarrassment is no greater than the embarrassment that may result from public reporting of unseemly facts revealed by courtroom testimony or in written exhibits. Criminal trials always involve the revelation of facts that are embarrassing—or worse. Much that was once confidential and clandestine becomes public knowledge as the evidence in a criminal trial unfolds. The law recognizes no interest in the privacy of such evidence. Certainly it recognizes none when the subject is a public official."[71]

In any event, the Court of Appeals did not hold that the prevention of embarrassment or the protection of privacy interests may never justify restrictions on the public's right of access to public records. Rather, it

clear that a public official cannot claim a "right of publicity" over his official acts.

[71] In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court held that public officials have no cause of action for damage to reputation unless false and defamatory statements are uttered with actual malice. "'[P]ublic men are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'" *Id.* at 268, quoting *Beauharnais* v. *Illinois*, 343 U.S. 250, 263-264 (1952). There is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. *See also, e.g., Near* v. *Minnesota*, 283 U.S. 697, 718-719 (1931); *Bridges* v. *California*, 314 U.S. 252, 270 (1941); *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975). Indeed, there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison* v. *Louisiana*, 379 U.S. 64, 77 (1964).

held that even assuming such power, Judge Gesell did not abuse his discretion in rejecting the claim of privacy on the facts of this case. 551 F.2d at 1263-1264 (emphasizing, *inter alia,* the fact that the contents of the tapes, which relate to the conduct of the Presidency, have been widely disseminated). Whether or not Mr. Nixon has some "privacy interest" in these tapes that would command common law protection under some circumstances, Judge Gesell and the Court of Appeals surely did not abuse their discretion in deciding that that interest did not overcome the public's right to inspect and copy materials introduced into evidence at a criminal trial involving abuse of official power.

2. Release of the tapes will not invade Mr. Nixon's property rights.

Mr. Nixon asserts that there is no public right to inspect and copy materials subpoenaed from third parties and introduced as court exhibits in a criminal trial; the basis for this claim is that such exhibits are the personal property of the owner, while the court is a "mere custodian". (Pet. Br. 17-23). We have demonstrated above that a court's power to make exhibits available to the public for inspection and copying does not turn upon any technical question of legal title, but is premised on the court's custody and control over the exhibits. To be sure, the public's right of access may be abridged in a particular case if "justice so requires," and certain property principles—for example, copyright protection that has been accorded a particular exhibit—may thereby enter into the court's calculus. But such private property principles do not establish an absolute prohibition on court dissemination of exhibits introduced as evidence in a public criminal trial."[72]

Mr. Nixon implies that even if this Court determines that a trial court has some power—no matter how narrow or broad—to release such exhibits, to do so in this case would "invade" "the property . . . interests of the participants in the conversations." (Pet. Br. 15). This property interest is allegedly "in the sound of [Mr. Nixon's] own voice,"[73] which Mr. Nixon

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[72] Calling the case "perhaps the closest reported case on its facts to this one," Mr. Nixon cites *King* v. *King*, 25 Wyo. 275, 168 P. 730 (1917) for the proposition that court exhibits are personal property that may never be released by the courts. (Pet. Br. 25). *King*, a sixty year old case from a different jurisdiction, involved a clearly distinguishable fact situation. *King* was the spin-off of a divorce proceeding involving private litigants, Margaret and Francis King. In the divorce proceeding, Margaret filed a deposition, attached to which were "personal and private" letters sent from Mary King to Francis King; Margaret King came into their possession "surreptitiously and clandestinely." 168 P. at 731. At the close of the divorce proceeding, by consent of all parties to the action, the deposition and letters were sealed and placed in the clerk's custody. The case from which Mr. Nixon quotes involved Margaret King's subsequent attempt to obtain copies of the letters that she had earlier stolen and still later consented to have placed under seal, and must be understood in that context. Moreover, the right of access in Wyoming was limited to cases falling within the English "special interest" rule, which was rejected long ago by most American courts. *See* p. 25 & n.8 *supra*. Like all of the cases cited by Mr. Nixon in this area, *King* involved the disposition of exhibits *after* the termination of judicial proceedings, not the court's power to make them available for inspection and copying while in the court's custody.

[73] The cases cited by Mr. Nixon for this proposition, *King* v. *Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963), and *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964), do not involve public officials. Moreover, both involved copyright claims, and Mr. Nixon has never alleged that he has a copyrightable interest in these tapes.

asserts is analogous to the "common-law property right in one's personal letters." (Pet. Br. 24-25)."[16] Mr. Nixon thus claims that "the choice of whether to release the recorded conversations belongs to Mr. Nixon, not to the respondents or the court." *Id.* at 26.

Respondent respectfully suggests that if the Court upholds the general power of a District Court to make exhibits available for public inspection and copying in appropriate cases—a power acknowledged by all Judges below—there is no occasion to analyze Mr. Nixon's particular property interests in these tapes to determine whether "justice requires" that they be withheld from copying. Mr. Nixon never raised this issue —as opposed to the general proposition that *no* exhibits can be released because they are not the property of the court—below, and at no time asserted any personal copyright or other proprietary interest in the tapes. Thus, he cannot be heard belatedly to assert that claim now. *See, e.g., Hill* v. *California,* 401 U.S. 797 (1971); *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969). In any event, there is considerable authority for the principle that the public generally rather than a particular public official is the owner of materials generated at public expense and relating to official duties. The argument that Mr. Nixon has no legal title to these tapes was fully canvassed in the briefs on the merits in *Nixon* v. *Administrator of General Services,* and in light of Mr. Nixon's failure to raise this issue below, we will not repeat those arguments, with which the Court is familiar. Should the Court nevertheless decide to resolve this reserved question, *see Nixon* v. *Administrator,* 45 U.S.L.W. at 4922 n.8, we submit

[16] Of course, in this situation the *content* of the tape recordings has been fully disclosed, and is admittedly in the public domain.

that "Presidential" papers belong to the public at large, and not to the particular individual occupying that position of public trust.

More fundamentally, even if Mr. Nixon once had a property interest in these tapes and his other Presidential papers, he no longer has a cognizable property interest to be asserted against the general public. In *Nixon* v. *Administrator of General Services,* the Court upheld the facial validity of Title I of the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 (1974), 44 U.S.C. § 2107. Under that Act, the Administrator of General Services is to take custody of Mr. Nixon's Presidential papers and original tape recordings and promulgate regulations that "(1) provide for the orderly processing and screening by Executive Branch archivists of such materials for the purpose of returning to appellant those that are personal and private in nature, and (2) determine the terms and conditions upon which public access may eventually be had to those materials that are retained." 45 U.S.L.W. at 4918.

The Court did not, however, address the constitutionality of any "access" regulations, since they had not been fully promulgated. Nevertheless, the Court specifically noted that "Aside from the public access eventually to be provided under § 104, the Act mandates two other access routes to the materials. First, under § 102(b), access is available in accordance with lawful process served upon the Administrator." *Id.* at 4924 n.13. Although Mr. Nixon may assert any "rights, privileges, or defenses" to such lawful process, that clearly cannot include any claim premised on bare legal title. To be sure, Mr. Nixon may assert such rights or interests as privacy or executive privilege, or other

interests which might require that the Administrator return custody of particular tapes or other materials to him. But if *Nixon* v. *Administrator* and the Act mean anything, it is that Mr. Nixon cannot make any argument based on the bare assertion that Presidential materials are "his" rather than the public's."

C. Denying Public Access to These Tapes Because of Potential "Over-Commercialization" Would Be Both Unconstitutional and Inconsistent With the Common Law Right.

In his Memorandum and Order of December 5, 1974 Judge Gesell wrote that "if any release is to be made, it must obviously be accomplished on a basis which does not permit overcommercialization of the evidence. Clearly, all persons, whether or not members of the press, desiring copies must be accommodated without special favoritism or priority." 386 F. Supp. at 643. In his Order of January 8, 1975, Judge Gesell stated: "It is a prerequisite to any plan that commercialization of the tapes or any undignified use of the material be minimized." 386 F. Supp. at 643. Judge Sirica, in his opinion denying the applications for immediate access, speculated about "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales" and about "untold varieties of inappropriate and scandalous uses." 397 F. Supp. at 188.

Mr. Nixon constantly returns to this theme of "overcommercialization" and "mass merchandising," be-

[70] If the government has legal title to such materials, then Mr. Nixon cannot claim them as his personal property. And even if Mr. Nixon had legal title before promulgation of the Act, that Act deprived him of title as to materials that are not "personal and private"; "§ 105(c) [of the Act] assures [Mr. Nixon] of just compensation if his economic interests are invaded." 45 U.S.L.W. at 4922 n.8; *see id.* at 4930-4931, 4932 & n.42.

moaning the prospect of the tape recordings being made available to the public "in permanent form to be played at cocktail parties, to be used in comedy acts or dramatic productions, and otherwise to be exploited for every purpose and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies." (Pet. Br. 30). Mr. Nixon argues that this Court in *United States* v. *Nixon* did not intend that tapes of presidential conversations, even if entered into evidence in a criminal trial, "could be broadcast into the living rooms of the American public and enshrined among the Top 40 best-selling phonograph records." (Pet. Br. 49) (*See also*, Pet. Br. 14-17, 33)."[70]

Certainly nothing in this record supports Mr. Nixon's concern about scandalous use of the tapes. War-

[70] Mr. Nixon is not well positioned to complain of "commercial" use of the tapes. This Court can judicially notice an affidavit he filed on or about June 25, 1975 in *Nixon* v. *Administrator of General Services*, C.A. No. 74-1852 (D.D.C.). Although the tapes were created at government expense and relate to the conduct of public affairs, Mr. Nixon explains in that affidavit that they were to be used not for any official purpose, such as enhancing the efficiency of the White House, but for Mr. Nixon's personal commercial purpose—his future memoirs, which would be highly lucrative:

> "The installation of the recording capability for conversation in the Oval Office and Executive Office Building and elsewhere stemmed in large part from a recommendation I received from President Johnson by way of a close mutual friend. President Johnson sent word to me that he had learned that as one of my first actions upon arriving at the White House I had ordered the removal of the recording devices he had installed there. President Johnson said that the recordings he had made of his conversations while President had proved to be exceedingly valuable in preparing his memoirs and he urged that I reinstall the recording devices. Thereafter, I consented that this be done, . . ." Affidavit of Richard Nixon, ¶ 23, pp. 16-17.

ner's publicly disclosed intentions involve no improper use. *See* pp. 17-18 *supra*." Moreover, transcripts of the tapes have been in circulation for over two years, and the record contains no evidence that they have been put to any scandalous use. Sound recordings are no more susceptible to abuse than are verbatim transcripts. In any event, we do not defend against the charge of "overcommercialization" on these grounds. Our proposed order to implement Judge Gesell's December 5, 1974 Memorandum and Order expressly provided for access to the tapes by *all* members of the public on a fair and equal basis at the lowest cost (A. 47), and the same care has been taken in drafting a plan for the tapes' release in response to the Court of Appeals' order of October 26, 1976. 551 F.2d at 1265; *see* Warner's Opposition to Pet. Writ Cert. at A-6 to A-13. Beyond that, we do not know what "overcommercialization" really means or constitutionally could mean.

The bogeyman of "overcommercialization" is not a legitimate issue in this case. If, as we have argued, there are no public or private interests of sufficient weight to overcome the public's right of access to these tape recordings, it would be a gross infringement of the First Amendment to block public access to these materials because of some feared or imagined "scandalous uses" to which they might be put.

The First Amendment protects phonograph records and tape recordings no less than other forms of com-

[11] Judge Gesell noted that the announced plans of Warner Communications, Inc. advanced the congressional, judicial, and executive judgments that materials such as these evidentiary tapes, which shed light on government conduct at the highest levels, should be preserved and made available to the public. 386 F. Supp. at 642.

munication, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952), and that protection is undiminished by the fact that records and tapes are sold for a profit:

> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures." *Id.* at 501-502.

In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), this Court struck down a statute prohibiting advertisements for abortions:

> "The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. . . . *The existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.' . . . The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.*" *Id.* at 818, 826 (citations omitted) (emphasis supplied).

Indeed, "commercial speech" has received explicit constitutional protection in a wide variety of contexts. *E.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Lin-*

mark Associates v. *Township of Willingboro*, 45 U.S. L.W. 4441 (1977); *Carey* v. *Population Services Int'l*, 45 U.S.L.W. 4601 (1977); *Bates* v. *State Bar of Arizona*, 45 U.S.L.W 4895 (1977).

Just as the First Amendment's guarantee of free speech and a free press may not be conditioned on an absence of commercial motive, the public's right to inspect and copy these official court records should not be contingent upon members of the public putting these court records to limited, approved uses."[18]

The courts, and the government generally, have no role to play in supervising the "tastefulness" or "dignity" with which matters are communicated to the American public.[19] Any attempt to play such a role would constitute an imposition of censorship and prior restraint. In *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975), this Court noted: "Our distaste for censorship—reflecting the natural distaste of

[18] Any attempt to prevent a constitutionally protected medium from earning a profit would be indistinguishable from the newspaper gross receipts tax held unconstitutional in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Nor is publication for a profit in any way demeaning to judicial or other government documents. Judicial opinions are routinely published for a profit by West Publishing Company and other business firms, and Mr. Nixon's version of the tapes released in transcript form on April 29, 1974 received wide commercial distribution, apparently with Mr. Nixon's consent.

[19] The Court of Appeals noted that Mr. Nixon's objection as to the "unseemliness" of public distribution of the tapes was "essentially a question of taste, and provide[d] a singularly weak basis for a court to interfere with the exercise of a long-established common law right. Indeed, a substantial argument could be made that it is highly appropriate for recordings of conversations concerning the conduct of public business to be marketed to the public, or at least no more inappropriate than for transcripts of the conversations to be marketed." 551 F.2d at 1265.

a free people—is deep-written in our law." And more recently, in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209, 215 (1975), the Court stated:

> "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . '[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"

Erznoznik, Southeastern Promotions, Ltd., and the cases cited therein demonstrate that this Court, at least in the past, has condemned governmental censorship based on notions such as "inappropriateness" or "scandalousness". As the Court observed in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971), "so long as the means are peaceful, the communication need not meet standards of acceptability." "[I]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California*, 403 U.S. 15, 25 (1971). In *Cohen*, the Court held that the First Amendment protects the public display of a four-letter expletive. Similarly, blasphemy is constitutionally protected. *Winters* v. *New York*, 333 U.S. 507 (1948). Crude political hyperbole is protected. *Watts* v. *United States*, 394 U.S. 705 (1969). In the obscenity area, even under *Miller* v. *California*, 413 U.S. 15 (1973), much that is offensive, distasteful and undignified can pass constitutional muster.

The fact that the immediate concern here is the release of court material does not create a power to regulate subsequent use of that material. Certainly, the

government could not condition release of a text or tape of the State of the Union Message or another government document on an agreement by recipients to treat it only in a "tasteful" and "dignified" manner. Such a condition would be an unconstitutional one. *See, e.g., Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

Even if the right of access is viewed as a common law right, the extent of prospective "commercialization" should not be deemed a permissible basis for infringing that right. As the Court of Appeals stated, the fact "[t]hat at least some appellants assert this precious [common law] right in order that they might personally profit in no way diminishes their status as rightholders." 551 F.2d at 1260 n.37. To hold otherwise would tend to eviscerate the right. One may reasonably suppose that the public will be most anxious to exercise its rights of inspection and copying when a court exhibit or other court record touches on the pressing concerns of the day. But when an issue is of great public importance and interest, the natural "commercial" tendencies of the free enterprise system are most likely to come into play. If the inevitable pressures to "commercialize" information of great public interest are permitted to defeat the public's right of access, the public will be stymied at precisely those moments when its right of access should be given greatest sway; the greater the public's interest in a court record, the more potent the "overcommercialization" rationale for denying access to it. If the right of public access is grounded on the theory that information in official court records should be available to the public, the fact that some members of the public may profit in disseminating that information should be totally irrelevant.

We respectfully submit that the only proper concern of the Court in the general area of "overcommercialization" is that the tapes be made available to the entire public on a fair and equal basis and at a reasonable cost. That is the way in which the Court of Appeals interpreted Judge Gesell's opinion, 551 F.2d at 1265, and that is the only relevant concern for the courts.

CONCLUSION

Respondent Warner Communications, Inc. asserts that there is both a constitutional and a common law right to inspect and copy court records—including exhibits introduced as evidence in a criminal case. Those rights are always precious, and in the instant case, they are compelling. The tapes at issue reveal abuse of public office by some of the Nation's highest officials during Mr. Nixon's tenure as President, and the record amply demonstrates that the aural qualities of the cover-up conversations, captured only on the tapes, are crucial facts that are necessary for a full understanding of the cover-up and the ensuing trial in *United States* v. *Mitchell.* Indeed, the right of access to these tapes is reinforced by the considered legislative judgment, embodied in the Presidential Recordings and Materials Preservation Act, that there is a vital need to provide the American people with a full historical record of the abuses of power known as "Watergate."

There may be situations in which the public's right of access may be abridged in the interests of justice. This is not such a case. No one's right to a fair trial will be compromised by prompt dissemination of the tapes, and none of the values underlying the need for

confidential presidential decisionmaking will be undermined in light of the public nature and widespread distribution of the content of the tapes. Nor does Mr. Nixon assert any cognizable personal privacy or propriety interests that should preclude release of the tapes. These tapes are verbatim records of the transaction of official government business, and certainly after the decision in *Nixon* v. *Administrator of General Services* Mr. Nixon cannot validly claim that such records are "his" rather than the public's.

The courts below have exercised sound judicial discretion in holding that the public interest in an informed and enlightened public opinion mandates release of these tapes, and the Court of Appeals' decision—a narrow decision premised on particular facts unique in our history but reached under well-established principles of the common law—should be ratified by this Court.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE

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Amend. I 16, 33, 34, 35, 37, 37n

Amend. IV 52n

Amend. VI 16, 33, 38, 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC. and
NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION AND PUBLIC BROADCASTING SERVICE

Opinions Below

The opinion of the Court of Appeals (Pet. App. 1a-27a)* is reported at 551 F.2d 1252 (D.C. Cir. 1976). The Memorandum and Opinion and Order of the District Court from which an appeal was taken by the Respondents herein

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* "App." refers to the Appendix filed with Petitioner's Brief. "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case. "JA" refers to the Joint Appendix filed with the Court of Appeals.

(Pet. App. 29a-35a) is reported at 397 F. Supp. 186 (D.D.C. 1975). Earlier opinions written by Judge Gesell with respect to the same application by the Respondents (Pet. App. 36a-45a) are reported at 386 F. Supp. 639 (D.D.C. 1975).

Jurisdiction

The decision of the Court of Appeals was entered on October 26, 1976. (Pet. App. 1a-27a) A petition for rehearing and a suggestion for rehearing *en banc* were denied on December 3, 1976. (Pet. App. 28a) The petition for certiorari was filed on January 7, 1977 and was granted on March 28, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Did the United States Court of Appeals for the District of Columbia correctly hold that, pursuant to the long-established common law right of all citizens to inspect and copy public records, members of the broadcast press should be permitted to copy the White House tapes played in open court and introduced in evidence in *United States* v. *Mitchell, et al.*, for the purpose of broadcasting them to the public?

Statement of the Case

The trial of former Attorney General John Mitchell, former White House aides H. R. Haldeman, John Ehrlichman and Robert Mardian and Attorney Kenneth W. Parkinson commenced before Judge Sirica in the United States District Court for the District of Columbia on October 1, 1974. Central to the trial were the so-called White House

tapes introduced in evidence by the prosecution. The trial lasted over 13 weeks, and it is estimated that approximately 1300 members of the public attended some or all of the trial. (App. 21) Each person attending the trial was furnished with earphones which permitted him to listen to the White House tape recordings as they were introduced in evidence and played to the jury. Transcripts of the tape recordings were published in newspapers, magazines and books. And, as the petition for certiorari in this action correctly observed, the transcripts "continue to be available at bookstores around the country." (Pet. 14)

On November 12, 1974, a group of broadcasters consisting of National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and CBS Inc., together with the Radio Television News Directors Association, filed a petition seeking the opportunity to copy the tapes introduced in evidence so as to broadcast them to the public. (App. 12-14) On November 13, 1974, Public Broadcasting Service joined the application. (App. 18-19)

On November 13, 1974, the application of the broadcasters (which had been made before Judge Sirica) was assigned by Chief Judge Hart to Judge Gesell (App. 17-18), who directed the Clerk of the Court to prepare a statement in affidavit form detailing the mechanical procedures followed during the *Mitchell* trial in reproducing, playing to the jury and receiving in evidence the tapes and indicating any facts bearing upon the availability for reproduction by the Clerk of those portions heard by the jury and the expense and time factors involved. All parties served with the broadcasters' application, including all the defendants, the Special Prosecutor's Office and former President Nixon, who desired to support or oppose the application were ordered to file written positions with respect thereto by November 26, 1974. (App. 22)

On November 26, 1974, the United States filed a statement concluding that the "Special Prosecutor, as attorney for the United States, does not foresee that the rights of the defendants or of the United States to a fair trial would be jeopardized if the motion is granted, and accordingly, does not oppose the motion." (App. 28-29) In its memorandum, the United States also observed that if the motion were granted, procedures would be required to insure that the duplication process did not interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced in evidence. Since "more than one copy of the recordings already exists", the Special Prosecutor's Office concluded, "this should be no problem." (App. 29, n.3)

The affidavit filed on November 26, 1974 by James F. Davey, Clerk of the United States District Court for the District of Columbia, confirmed that the reproducing of tapes introduced in evidence could be accomplished without either interfering with the presentation of evidence or threatening the integrity of the original court exhibits. (App. 23-27)

No opposition was filed by any of the defendants in the *Mitchell* trial with respect to the broadcasters' application.* The only opposition to the broadcasters' application

* Of the five defendants, only one—H. R. Haldeman—filed any document with either the district court or the Court of Appeals. That was a one-sentence statement filed by Mr. Haldeman in the Court of Appeals opposing the broadcasters' application on the ground that it could prejudice his rights, if he should be granted a new trial. (App. 99) Mr. Haldeman's filed document did not state when this conclusion was reached and why it was not expressed to Judge Gesell; how it was believed any prejudice would or could result; and what legal basis, if any, there was in support of his opposition.

The Court of Appeals correctly held with respect to the one-sentence opposition filed with it that "[t]his pro forma statement hardly warrants careful attention." (Pet. App. 20a, n.47) Mr. Haldeman does not seek review by this Court of the decision of the Court of Appeals and, in light of the fact that this Court has recently denied certiorari to Mr. Haldeman's appeal from his conviction, 45 U.S.L.W. 3764 (U.S. May 23, 1977), the point may now be moot.

was filed by former President Nixon (App. 30-39), who contended, *inter alia*, that "broadcast of the tapes by the applicants" would "further intrud[e] on the need for confidentiality in presidential discussions and would violate the privacy of and embarrass individuals, including Mr. Nixon, whose voices were contained on the White House tapes. (App. 31)

Judge Gesell's Ruling

On December 5, 1974, Judge Gesell entered an opinion and order (Pet. App. 36a-43a) concluding that "[t]he tape exhibits are in evidence and have therefore come into the public domain and the public should have an opportunity to hear them." (Pet. App. 41a) Judge Gesell concluded that:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (1894). *See also, United States* v. *Burka*, 289 A.2d 376 (1972); *Belt* v. *Pr. George's County Abstract Co.*, 73 Md. 289,

20 A. 982 (1890)." (Pet. App. 38a; emphasis in original)

Judge Gesell further held that the general right of the public to have access to and copy exhibits was especially reinforced in this particular case by the directives of the Judicial Conference of the United States issued under authority of 28 U.S.C. § 457 (1970). Observing that there was "congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels", Judge Gesell concluded that "the public should have the opportunity to hear [the tapes]." (Pet. App. 40a-41a)

Judge Gesell then dealt with and rejected the arguments against broadcasting the tapes made by former President Nixon. Noting that the Court had "carefully reviewed transcripts of the tapes in issue" and that it was apparent that Judge Sirica had "assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial", Judge Gesell concluded that:

"Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words

cannot be retrieved; they are public property and his opposition is accordingly rejected." (Pet. App. 41a)

The opinion concluded with a request for suggestions from the parties by January 2, 1975 as to how the tapes should be made available to the public.

The Motion for Certification

On December 18, 1974, former President Nixon moved Judge Gesell to certify his decision and order pursuant to 28 U.S.C. § 1292(b) (1970). (JA 63-72) The motion urged that Judge Gesell's December 5 order had resolved in the broadcasters' favor all relevant issues in the case with respect to the right of the broadcasters to copy and broadcast the tapes introduced in evidence, leaving only "for later decision whether a procedure can be created whereby copies can be made available without undue burden to the Clerk and without 'over commercialization' in the initial distribution process." (JA 64)

Judge Gesell's Rejection of the Initial Plan Submitted

On December 27, 1974, the broadcasters and Warner Communications, Inc.* ("Warner") filed a memorandum and proposed order before Judge Gesell setting forth their detailed suggestions as to how the tapes could be reproduced and distributed to the public in a manner consistent with Judge Gesell's order of December 5, 1974. (App. 47-

* Warner filed a separate application for leave to copy the tapes on December 2, 1975, three weeks after the filing of that of the broadcasters and while the broadcasters' application was pending before Judge Gesell. (App. 39-40) The broadcasters' appeal from Judge Sirica's ruling to the Court of Appeals was docketed as No. 75-1409; Warner's was docketed as No. 75-1410. (App. 1) For reasons which have not been stated, Mr. Nixon reversed the order of the parties in the caption chosen for submission of this case to this Court on petition for certiorari.

55) By order dated January 8, 1975, Judge Gesell declined to accept the detailed suggestions of the broadcasters and Warner with respect to the copying and distribution of the tapes. (Pet. App. 44a-45a) Judge Gesell thereupon denied the pending applications without prejudice and referred the matter back to Judge Sirica for any further action. (*Id.*)

Judge Sirica's Ruling

After the conclusion of the *Mitchell* trial, Judge Sirica held a hearing on March 6, 1975 at the request of the applicants with respect to the status of the application. At the hearing, Judge Sirica requested briefing as to whether the *Mitchell* trial should be deemed over for purposes of his consideration with respect to permitting the copying of the tapes. After submission of briefs limited to this issue, Judge Sirica entered an order denying immediate access to the tapes. (Pet. App. 29a-35a) The primary basis for the decision was Judge Sirica's conclusion that public dissemination of the tapes might be prejudicial to the convicted defendants in the *Mitchell* case should a retrial be ordered. (Pet. App. 30a-31a)

The Decision of the Court of Appeals

The decision of the Court of Appeals reversed Judge Sirica's decision—and did so on narrow and explicitly non-constitutional grounds. Holding that at common law "a right to inspect and copy public records" has long existed (Pet. App. 8a)—a right not denied by Mr. Nixon (Pet. App. 12a)—the Court held that the common law right extended as well to court exhibits. Acknowledging that the right of access to judicial records was not absolute, the Court concluded that Judge Sirica had erred by permitting the "diminished interests in confidentiality" of

already publicly-heard tapes "to interfere with the public's right to inspect and copy the tapes." (Pet. App. 17a)

The Court dealt first with Judge Sirica's conclusion that absent a "compelling reason" to make the tapes public he would not do so because of the possibility of interfering with the rights of the defendants in any new trial which they might be afforded by virtue of appellate review of their convictions. Concluding that the district court had "misconceived the nature of its discretion" by placing the burden in the case on the broadcasters rather than on Mr. Nixon, the Court of Appeals held the risk of interfering with the rights of the defendants at a "hypothetical second trial" far too indefinite, insufficiently grave (in that the tapes had all been held to be admissible evidence), and all but totally unsupported by the very defendants the order was designed to protect.* (Pet. App. 17a-20a)

The Court of Appeals further held that Judge Gesell had not abused his discretion in determining that the tapes could be inspected and copied. The "privacy" considerations relied upon by Mr. Nixon were rejected, as were Mr. Nixon's arguments that some kind of residual deference should be paid to presidential conversations after they had been played in open court and after their widespread publication. (Pet. App. 22a-25a)

The Court of Appeals further ordered that, on remand, a plan be devised which would assure prompt distribution of the tapes "on an equal basis to all persons desiring copies." (Pet. App. 25a) On motion of Mr. Nixon, the Court of Appeals stayed its mandate pending the filing of a petition for certiorari. However, it remanded the record to Judge Sirica in the interim for the limited purpose of

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* As noted previously, only defendant Haldeman filed any opposition to the broadcasters' application and that was a pro forma opposition. (Pet. App. 20a, n.47)

permitting the adoption of a plan of distribution of the tapes to the public.*

Introduction and Summary of Argument

Introduction: The Tapes

We start with a proposition that has never been at issue but which is at the heart of the case: hearing the White House tapes introduced in evidence in the *Mitchell* trial adds considerably to one's ability to comprehend what was meant by each of the participants in the cataclysmic national events which have come to be known under the heading of Watergate. As Fred Graham of CBS News observed in his affidavit submitted during the trial:

> "[I]n perhaps the most important trial in this country's history from the standpoint of informing the public, I have found the broadcast media handicapped because of the crucial role of the tapes. As I listen to the tapes in the courtroom, I find that I understand Watergate in a way that I had never understood it before, even though I have reported almost exclusively on Watergate for the past eighteen months. The only way to try to convey this to the public in a broadcast is to attempt to copy the speakers' inflections as I quote them on the air—but this is so difficult and I am so unsure that I can do fairness to them all, that I have virtually abandoned it." (App. 21)

* On January 11, 1977, the broadcasters and Warner submitted a plan to Judge Sirica pursuant to which the National Archives and Recording Service (the "National Archives") would produce and distribute the tapes to the public. The National Archives had previously agreed to accept the responsibilities involved in the plan submitted. A copy of the plan submitted is annexed as Appendix 3 to the opposition filed by Warner to the granting of certiorari.

Numerous affidavits submitted to the District Court demonstrated that only by hearing the tapes could one understand the import of what was being said. Carol Falk of *The Wall Street Journal* thus observed that:

> "In a telephone conversation between Charles Colson and Hunt, Colson repeatedly asks Hunt to say no more about Watergate, and Hunt repeatedly tries to involve Colson by giving him pieces of information. Colson's expressive voice and the pace of his pleas to Hunt impressed me with the fact that he was trying desperately to end the conversation without alienating Hunt, and that Hunt was making it difficult for him to do so. The tape captures the interplay between these two personalities far better than the transcript can." (App. 78)

Another example was provided by Hays Gorey of *Time Magazine* who recalled that:

> "Phrases like 'uh-huh,' and 'um-hum,' appear throughout the recordings and the transcripts. In the transcripts, they are all the same, or nearly the same. In the recordings, those expressions are vastly different: an 'um-hum' in one context, and said with one tone of voice, can mean mere acknowledgment of an idea or a proposal; in another context and said in another tone of voice, it expresses surprise, or determination, or acceptance or rejection. I recall that on one occasion during the trial there was a serious clash between John Ehrlichman and James Neal over whether a particular 'uh-huh' uttered by Ehrlichman during one of the taped conversations signified acceptance or rejection of the idea being discussed. A reader of the transcripts simply could not tell; but a person who listened to the tape could easily decide

that on that occasion Mr. Ehrlichman's 'uh-huh' unmistakably signified acceptance." (App. 83-84)

Even when otherwise clear words are used in the tapes, the import of a statement varies greatly depending on whether it was meant as a declaration, a query, a suggestion or mere wishful thought. Finlay Lewis of *The Minneapolis Tribune* thus observed that:

> "On the tape of a March 21, 1973 conversation, Mr. Nixon and John Dean discuss the payment of hush money to E. Howard Hunt, Jr. At one point, Mr. Nixon says to Dean: 'For Christ's sake, get it.' The interpretation of that statement was the subject of considerable debate within the House Judiciary Committee, which was relying on the transcript of the conversation rather than on the tape recording. But when one hears Mr. Nixon making that statement on the tape, it becomes clear that he is giving Dean a direct order to get hush money for payment to Hunt. The tape removes the ambiguities of the transcript." (App. 91-92)

Perhaps the best illustration of the public advantage served by hearing the tapes, as opposed to merely reading transcripts of them, was offered by Mr. Nixon in his recent televised interviews with David Frost. As the Court will doubtless recall, significant portions of the interview dealt in their entirety with what Mr. Nixon *meant* when he uttered certain words which are contained on the tapes. One extended example may suffice:

(Frost) "Here's Dean, talking about this hush-money for Hunt; talking about blackmail and all of that; I would say that you endorsed to ratify it. But, let's leave that on one side. . . .

(Nixon) "I didn't endorse or ratify it.

(Frost) ". . . why didn't you stop it?

(Nixon) "Because at that point, I had nothing to . . . no knowledge of the fact that it was going to be paid. I'd had no knowledge of that fact that, ah, the . . .

"what you have mentioned in the transcript of the next day, where Mitchell said he 'thought it'd been taken care of.' I think that was what the words were or words to that effect. I wasn't there. I didn't . . .

"I don't remember what he said. That was only reported to me. The point that I make is this: It's possible . . . it's a mistake that I didn't stop it. The point that I make is: That I did consider it. I've told you that I considered it. Ah, I considered it for reasons that I thought were very good ones. Ah, I would not consider it, ah, for, ah, the other reasons, which would have been in my view, bad ones.

(Frost) "But that night though, the night of the 21st. I mean, in the conversation with Colson after you'd been exchanging dialogue about getting off the reservation, and so on, ah, Colson said to you something about the fact that, 'It's the stuff after the cover-up. I don't care about the people involved in the cover-up; it's the stuff after that's dangerous, Dean and other things, and the things that have been done.' And, you said, as I'm sure you know ah, 'You mean with regard to the defendants. Of course, that was . . . that had to be done. Brackets (laughs)', whatever that means. But, I mean, so that night

you were saying that had to be done. You were realizing that doing something for the defendants was a necessity.

(NIXON) "No, I don't interpret that, that way at all. Ah, I, ah, I . . .

(FROST) "How do you recall it?

(NIXON) "I can't recall that . . . I can't recall that conversation, ah, and I can't vouch for the, the accuracy of the transcription on that. Ah, but I do say . . .

(FROST) "That's absolutely . . . it's an exhibit of the Watergate trial.

(NIXON) ". . . ah, that . . . the statements . . . the tapes that have been made public, on the 22nd, with regard to my . . . and the one on the 21st as well, ah, with regard to the whole payments problem, ah, I think are very clear with regard to my attitude.

(FROST) "But, on the short term point, that was, ah, an exhibit, and, ah, part of the, ah, basic file at the trial was that conversation, Colson saying, 'It's the stuff after that's dangerous.' And, you saying, 'You mean with regard to the defendants. Of course that was . . . that had to be done. Brackets (Laughs).' I mean, that's absolutely on the record, and, ah, authenticated and played publicly.

(NIXON) "Well, I can't interpret it at this time."•

• The above quotation is from pages 35 through 38 of the transcript of the Frost-Nixon interview broadcast nationally on May 4, 1977.

Hearing the tapes, we believe, will enable the public to make precisely the type of "interpretation" that Mr. Nixon could not make.

Summary of Argument

All the materials at issue in this case are public. All were played in open court and heard by those present in court. All have been published. The Court of Appeals held that, pursuant to the common law right of all citizens to inspect and copy public records, television and radio broadcasters should be permitted to copy the White House tapes played in open court and introduced in evidence in the *Mitchell* trial for the purpose of broadcasting such tapes to the public. We believe that the Court of Appeals' decision was, in all respects, correct.

In I art I of this brief, we urge that the Court of Appeals correctly held that the broadcasters were entitled, by long-standing common law rules and judiciai practices, to copy the White House tapes introduced in evidence at the *Mitchell* trial. We demonstrate by reference to extensive judicial and other authorities that the tapes which were introduced in evidence are as much a part of the judicial records of the *Mitchell* trial as are the docket sheets, pleadings and transcripts and, like any other public record, are subject to the public's right to inspect and copy such records while they are in the custody of the Clerk. The fact that the exhibits at issue in the present case are in the form of recorded material rather than documentary evidence is, we argue, of no consequence to and does not alter the public's common law right to inspect and copy such exhibits. We further demonstrate that, notwithstanding Mr. Nixon's submission to the contrary, the delicate constitutional issues raised by the contemporaneous recording of judicial proceedings are simply immaterial

to the broadcasters' present request to make copies of exhibits played in open court and introduced in evidence at such proceedings.

While it is not necessary, given the Court of Appeals' reliance on common law principles, for this Court to decide the question of whether the First and Sixth Amendments would, in and of themselves, require a finding that the refusal to allow the public to make copies of the tapes was unconstitutional, we demonstrate in Part II of our brief that First and Sixth Amendment considerations do add significant support to the opinion of the Court of Appeals. We argue that the First Amendment principles set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975) with respect to the overriding importance to our democratic form of government of the reporting by the press, fully and accurately, about judicial proceedings and public court records demonstrate the necessity for affording considerable weight to First Amendment precepts in determining this appeal. We discuss the principles underlying the Sixth Amendment's provision for a "public trial" of criminal cases and demonstrate that one of the purposes of the "public trial" requirement, in addition to protecting the defendant's rights to a fair trial, is to afford the public the opportunity to observe and criticize the operation of its judicial institutions. We urge that such Sixth Amendment considerations, especially when viewed in the context of the *Mitchell* trial which is of such political and historical significance, require that copies of the White House tapes introduced in evidence be made available to the public generally.

In Part III of the brief, we set forth the basis for our submission that the Court of Appeals was entirely correct in its rejection of the potpourri of arguments advanced against permitting the broadcasters to copy the White

House tapes introduced in evidence. We discuss Mr. Nixon's argument based upon executive privilege and its dispositive rejection by both Judge Gesell and the Court of Appeals—namely, that the tapes played at the *Mitchell* trial, which were carefully reviewed by the District Court to remove all extraneous and sensitive comments prior to the introduction of the tapes in evidence, are by definition no longer confidential. We urge that the Court of Appeals' decision was entirely consistent with this Court's opinion in *United States* v. *Nixon*, 418 U.S. 683 (1974) in allowing the tapes to be publicly disseminated. We demonstrate the frailty of Mr. Nixon's arguments both with respect to his alleged "property" rights in the tapes and with respect to the amorphous privacy argument which he continues to make in the face of the incontrovertible fact that, as Judge Gesell concluded, "[Mr. Nixon's] words cannot be retrieved; they are public property. . . ." (Pet. App. 41a) Finally, we submit that Mr. Nixon's surprising reiteration of the argument based upon the potential prejudice to the defendants (none of whom are presently raising any objections to the broadcasters' request) arising out of the hypothetical possibility of retrials in the *Mitchell* case cannot overcome the public's right to copy the tapes played at the trial both because of this Court's recent denial of certiorari to the defendants in the *Mitchell* trial and because, as the Court of Appeals correctly observed, the tapes all consist of admitted evidence not likely to prejudice a hypothetical juror in any such hypothetical retrial.

ARGUMENT

I.

The Court of Appeals Correctly Held the Broadcasters Are Entitled, by Long-Standing Common Law Rule, to Copy the White House Tapes Introduced in Evidence

As both Judge Gesell and the Court of Appeals held*, the public's right to inspect and copy judicial records, including exhibits, is firmly established both at common law and in court rules.** What is at issue, the Court of Appeals stated, is a "precious common law right, one that predates the Constitution itself." (Pet. App. 15a)

In its determination that the common law right of the public to inspect and copy court records was controlling, the Court of Appeals concluded, "[t]his common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state."

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* The dissenting opinion of Judge MacKinnon in the Court of Appeals did not in the slightest disagree with this conclusion, but only with the reversal of Judge Sirica's refusal to make the tapes available until after this Court had disposed of—as it now has—the appeals from the convictions in the trials before Judge Sirica and until Mr. Mardian's status was clarified. On January 17, 1977, the Special Prosecutor announced his decision not to retry Mr. Mardian. (New York Times, Jan. 18, 1977, at 12, col. 6) Thus, Judge MacKinnon's conclusion that "[i]n my view, at this time, we should affirm Judge Sirica in his decision refusing to permit a reproduction of portions of the tape *exhibits* until the appeals in the relevant cases are decided and the criminal charges disposed of by a final judgment" (Pet. App. 26a; emphasis in original) can hardly be read as a dissent from any portion of the ruling of the Court of Appeals which is presented by this case.

** *See generally* H. Cross, *The People's Right to Know* 135-52 (1953); 20 Am. Jur.2d *Courts* §§ 61-62 (1965); 66 Am. Jur.2d *Records and Recording Laws* §§ 12-18 (1973); 76 C.J.S. *Records* § 36 (1952); Annot., *Restricting Access to Judicial Records*, 176 A.L.R. 1260-1268 (1948).

(Pet. App. 10a) As early as Lord Coke, jurists recognized the right of the public to inspect and copy court records:

> "These records, for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the King's Treasury. And yet not so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England, and so is declared by an act of Parliament in 46 E 3." (Lord Coke, *Reports*, Vol. II, Preface)

Similarly, Greenleaf took notice of the common law right to inspect and copy judicial records as follows:

> "In regard to the inspection of public documents, it has been admitted from a very early period, that the inspection and exemplification of the records of the King's courts is the common right of the subject." (Greenleaf, *Evidence* § 457 (1899); emphasis added)*

The common law right to inspect "commonly carries with it the right to make copies without which the right

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* The common law right to inspect and copy judicial records is, as Judge Bazelon observed, simply an extension of the public's general common law right to inspect and copy public records. (Pet. App. 9a) (*See generally* the access-to-public-records cases referred to by Judge Bazelon at Pet. App. 9a, n.17.) Thus, as the Michigan Supreme Court noted in *Nowack* v. *Fuller*, 243 Mich. 200, 219 N.W. 749 (1928):

> "If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions." (219 N.W. at 750)

See also State ex rel. Colescott v. *King*, 154 Ind. 621, 57 N.E. 535 (1900) where the Supreme Court of Indiana concluded:

> "[T]here can be no sound reason advanced for depriving a citizen of this right; for it is evident that the exercise thereof [to inspect public records] . . . will serve as a check upon dishonest public officials, and will in many respects conduce to the betterment of the public service." (57 N.E. at 538)

to inspect would be practically valueless." *Direct Mail Service, Inc.* v. *Registrar of Motor Vehicles,* 296 Mass. 353, 5 N.E.2d 545, 546-47 (1937). *See also People ex rel. Gibson* v. *Peller,* 34 Ill. App.2d 372, 181 N.E.2d 376, 378 (1st Dist. 1962); *Garfield* v. *Palmieri,* 193 F.Supp. 137, 143 (S.D.N.Y. 1961) (dictum), *aff'd,* 297 F.2d 526 (2d Cir.), *cert. denied,* 369 U.S. 871 (1962); *Disabled Police Veterans Club* v. *Long,* 279 S.W.2d 220, 223 (Mo. Ct. App. 1955). As Judge Gesell observed in his December 5 Order:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh,* 2 App.D.C. 404, 407 (1894). *See also, United States* v. *Burka,* 289 A.2d 376 (1972); *Belt* v. *Pr. George's County Abstract Co.,* 73 Md. 289, 20 A. 982 (1890)." (Pet. App. 38a; emphasis in original)*

* As Petitioner rather grudgingly concedes (Pet. Br. 31), other federal district courts follow a similar practice with respect to allowing any applicants the right to inspect and copy all court records, including exhibits while in the custody of the Clerk. *See, e.g.,* D. Maine Rule 13:

> "Except upon order of Court, no paper or record on file with the Clerk, *including exhibits,* shall be removed from his custody, other than by authorized court personnel or for transmission to an appellate court; *but any person may inspect and copy such matter unless otherwise provided by statute, rule or order of Court.*" (emphasis added)

In response, Petitioner argues (Pet. Br. 19-23) that the common law right and court practices relied upon by Judge Gesell and the Court of Appeals do not include within their sweeping ambit those exhibits introduced in evidence which were obtained by a subpoena *duces tecum* because such materials "do not belong to the court at all, but are only in the court's temporary custody by virtue of compulsory process upon an individual or organization." (Pet. Br. 20) The Court of Appeals' terse response to this question-begging argument is dispositive:

> "To be sure, once a case is concluded, exhibits generally are returned to their owners, primarily because it is impractical to retain the exhibits in the courthouse. *But [Petitioner] has not offered a single reason for denying public access to exhibits while they are in the Clerk's custody.*" (Pet. App. 13a; emphasis added) (Footnotes omitted)

The cases cited by the Petitioner in support of his theory (Pet. Br. 21-23) are totally immaterial to the critical question raised by the Court of Appeals—namely, what reasons, if any, exist for overcoming the public's right to inspect and copy exhibits played in open court and introduced in evidence "while they are in the Clerk's custody."

See also C.D. Cal., Rule 29(e); E.D. Cal. Rule 4(b); N.D. Cal. Rule 5(e); S.D. Cal. Rule 29(b); E.D. Ill. Rule 18; N.D. Ind. Rule 19; S.D. Ind. Rule 16; E.D. Mich. Rule 26(7); N.D. Ohio Rule 11(e); N.D. Okla. Rule 16(d); W.D. Okla. Rule 15(d); W.D. Wisc. Rule 22. Significantly, even though some federal district courts do not appear to make any explicit written provision for the copying of exhibits, we have been unable to find *any* express prohibitions of such a practice in the local federal courts' rules. Moreover, no local federal court rule or practice with respect to the public's right to inspect and copy exhibits has been found which makes the operation of such a right dependent upon the distinction formulated in Petitioner's brief between documentary and non-documentary exhibits. (*See, e.g.,* Pet. Br. at 31-38)

(Pet. App. 13a) Thus, Petitioner inexplicably relies upon cases such as *Application of Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.) (Pet. Br. 21) which set forth subpoenaed parties' and grand juries' rights of access to and possession of materials subpoenaed during and after their use at grand jury proceedings.* These grand jury cases are simply and totally inapposite to the broadcasters' rights to copy those exhibits in the custody of the Clerk which were played in open court and introduced in evidence in the *Mitchell* trial. Similarly immaterial are cases such as *United States* v. *Birrell*, 242 F.Supp. 191 (S.D.N.Y. 1965) (Pet. Br. 22, n.11) which discuss those situations in which a subpoenaed party may sometimes be permitted to comply with a subpoena *duces tecum* simply by attending grand jury or court proceedings with the subpoenaed materials. Such cases, even if they state the law accurately,** are obviously irrelevant to the public's common law right to copy judicial records while they are in fact in the custody of the court. In short, Petitioner's argument with respect to materials in the court's "temporary custody by virtue of compulsory process" (Pet. Br. 20) never responds to or even touches upon the Court of Appeals' search for a "single reason for denying

* *See, e.g., Application of Kelly, supra,* 19 F.R.D. at 270:

"Thus what is involved is a proper balance between the right of the grand jury to the 'temporary use of the books' and the right of a party to be protected against unreasonable and oppressive production of records which may be disruptive of its normal business activities . . . ." (footnote omitted)

See also Robert Hawthorne, Inc. v. *Director of Internal Revenue*, 406 F.Supp. 1098, 1129-33 (E.D. Pa. 1976); *Hale* v. *Henkel*, 201 U.S. 43, 75-77, 80 (1906) (Opinion of the Court; McKenna, J., concurring); *Application of Bendix Aviation Corp.*, 58 F.Supp. 953, 954 (S.D.N.Y. 1945).

** *See contra, Robert Hawthorne, Inc., supra,* 406 F.Supp. at 1131, n. 66. *See also* Fed.R.Crim. P. 17(c); *United States* v. *Nixon*, 418 U.S. 683, 697-702 (1974).

public access to exhibits *while they are in the Clerk's custody.*" (Pet. App. 13a; emphasis added)*

Judicial recognition of the public's common law right to inspect and copy all judicial records, including exhibits while in the custody of the court, may be found in *Sloan Filter Co.* v. *El Paso Reduction Co.*, 117 F. 504 (C.C.D. Colo. 1902).** In *Sloan Filter Co., supra,* the court held that an interested non-party to a patent dispute had the right to inspect and copy the *testimony and exhibits* on

* Petitioner's reliance in his brief (at 22) on *United States* v. *Monjar*, 154 F.2d 954 (3d Cir. 1946) is, as the Court of Appeals noted, "misplaced". (Pet. App. 12a-13a, n.28) The overriding concern of the court in *Monjar* related to questions of comity between the federal and state court systems. More specifically, the Court of Appeals held in *Monjar* that a Pennsylvania district attorney who was seeking various "books, documents and other exhibits" (154 F.2d at 955) obtained by subpoena *duces tecum* and introduced in evidence by the United States in a related federal trial held in the District Court of Delaware should be permitted to do so by proceeding in the state courts under the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." (154 F.2d at 958-59) "Otherwise," the Court reasoned, "the delicate balance which comity has asserted hitherto in the courts of our dual system might be disturbed." (*Id.* at 959) Furthermore, the court's assertion in *Monjar* (made in the context of its discussion of comity) that the possession by the Clerk of exhibits was "at least in one sense, that of a mere custodian" (*id.* at 957) was immediately followed by the caveat that it "d[id] not intend to imply that the absolute control of exhibits introduced into evidence in a trial in a district court of the United States does not rest in that court." (*Id.* at 958) *See also Allen* v. *Lackey*, 199 Okla. 513, 188 P.2d 215, 217 (1947). There is simply nothing in the *Monjar* court's assertion that the Clerk's possession of the exhibits is "at least in one sense, that of a mere custodian" (154 F.2d at 957) to alter or compromise the public's "precious common law right" (Pet. App. 15a)—namely, that "judicial records, of which by statute and unvarying usage, *the custodian*, upon payment of the fee allowed by law, is bound to furnish copies." (*Brewer* v. *Watson*, 71 Ala. 299, 304 (1882); emphasis added)

** Significantly, the Petitioner's brief neither discusses nor cites the *Sloan Filter Co.* decision, despite the Court of Appeals' express reliance on the case. (Pet. App. 14a, n.33)

file in a patent infringement suit which the parties to the action had unsuccessfully sought to dismiss with a stipulation that would have barred such inspection rights. (117 F. at 506-07) The court concluded that:

> "[T]he matter of inspecting and taking copies of public records is as old in the law as the records are old. In English law, tenants of a manor could always inspect the court rolls and books of the manor in order to ascertain their titles. . . . So, also, where the authority of a mayor was in question, citizens could inspect the books and papers of the borough in order to determine the fact. . . . These cases and others support the common-law rule that a party may have inspection of any document or paper in which he may be interested. . . . In American reports cases may be found to the same effect." (117 F. at 506-07; citations omitted)*

* Nor have the courts limited the right to inspect and copy court exhibits to interested non-parties. In *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957), the Court considered a motion by a non-party who had no special interest in an appeal that was pending before the Court of Customs and Patent Appeals but who nevertheless desired a copy of the Patent Office Board of Appeals' decision. The motion was granted despite the absence of any special interest in the applicant on the grounds that, as the Court of Customs and Patent Appeals concluded:

> "[I]t is clear that at common law, no special interest had to be shown for a member of the public to gain access to judicial records, at least as far as a majority of the courts were concerned. *Access to such records was held to be an unqualified matter of right.*
>
> ". . . [S]tatutes conferring the right to inspect or use public records should be liberally construed in favor of inspection." (248 F.2d at 958-59; emphasis added) (Footnote omitted)

See also New York Post Corp. v. *Liebowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957), where the New York Court of Appeals held that the plaintiff-newspaper had a right to receive a transcript of the trial judge's charge to the jury despite the fact that the trial had been open to the public and despite the fact that the newspaper was not a party to the action.

Other cases following the common law principles underlying the *Sloan Filter Co., supra,* opinion include *Ex parte Drawbaugh,* 2 App. D.C. 404 (1894), in which the court refused to seal any of the files relating to an appeal from the Patent Office to the Court of Appeals of the District of Columbia because such files were held to be subject to public inspection like those in any other case. The court there noted:

> "[A]ny attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice." (2 App. D.C. at 407-08)*

Similarly, in *Brewer* v. *Watson, supra,* where the plaintiff was denied access to public tax ledgers, the Alabama Supreme Court stated:

> "And the individual who claims access to public records and documents (*not judicial records, of which, by statute and unvarying usage, the custodian, upon payment of the fee allowed by law, is bound to furnish copies*) can properly be required to show that he has an interest in the document which is sought and that the inspection is for a legitimate purpose." (71 Ala. at 304; citations omitted) (emphasis added)

The right to inspect and copy judicial records—a right understood by the Court of Appeals to be "fundamental

* *See also United States* v. *Burka*, 289 A.2d 376 (D.C.App. 1972); and *In re Sackett*, 136 F.2d 248 (C.C.P.A. 1943) where the Court of Custom and Patent Appeals, citing *Drawbaugh, supra,* denied a motion to seal all the records in a case already decided by the Court against the movant.

to a democratic state" (Pet. App. 10a)—clearly encompasses the right to copy exhibits played in open court and introduced in evidence which are in the form of taped rather than documentary evidence. Both Judge Gesell, in his December 5 Order (Pet. App. 41a) and the Court of Appeals (Pet. App. 10a, n.21) explicitly rejected (and no judge in this case has yet to accept) Petitioner's argument made again to this Court (*see* Pet. Br. at 31-38) that, in enforcing the common law right to inspect and copy public records, courts should treat recorded materials differently from documentary records. As Judge Gesell held, "The law must be applied and the fact the evidence is in aural form is of no special consequence." (Pet. App. 41a)*

*Brief reference should be made to the hypothetical parade of horrors raised by Petitioner (*see, e.g.*, Pet. Br. at 35-37) which allegedly flow from the refusal of Judge Gesell and the Court of Appeals to recognize Petitioner's artificial distinction between documentary and non-documentary public records. The Court of Appeals responded to Petitioner's arguments as follows:

> "Appellee does point to examples of exhibits, such as pornographic movies and tapes of wiretapped conversations, that arguably should not be subject to public inspection. But while these hypotheticals may justify a power to deny public access in special cases, they do not justify a total ban on inspection." (Pet. App. 13a-14a) (Footnote omitted)

Furthermore, Petitioner's argument that the right to inspect and copy court exhibits would infringe on copyrights is simply inapposite. Since both films and books are of course statutorily protected under the copyright laws (17 U.S.C. §§ 1 *et seq.* (1970 & Supp. V 1975), no member of the public may copy such materials even if they are permitted either to be shown in open court or to be excerpted in the transcripts or opinions arising out of a judicial proceeding. *Marvin Worth Productions* v. *Superior Films Corp.*, 319 F. Supp. 1269, 1271 (S.D.N.Y. 1970). *See also Douglas International Corp.* v. *Baker*, 335 F. Supp. 282, 285 (S.D.N.Y. 1971).

As the *Marvin Worth*, *supra*, decision concludes, if such a theory were accepted, "James Joyce's *Ulysses*, for example, would lie within the public domain merely because the United States prosecuted the book. . . ." (*Id.* at 1271) There is surely nothing in the broadcasters' present request which even remotely suggests the possibility of supporting such a patently absurd result. Nor is

Petitioner further attempts to buttress his argument that "courts have drawn a sharp distinction between documentary materials and tape recordings" (Pet. Br. 32) by reference to various court decisions and district court rules which prohibit the tape or television recording of judicial proceedings themselves. (Pet. Br. 32-33, n.21) This case, however, does not now involve and never did involve any of the sensitive issues of fair trial and freedom of the press raised by the introduction of video and/or tape recording devices into the criminal trial process. The difficult issues raised by cases such as *Estes* v. *Texas*, 381 U.S. 532 (1965) are simply inapposite to this case. The broadcasters' request to copy the tape exhibits played in open court and introduced in evidence at the *Mitchell* trial never required (and surely does not now require) the District Court to allow the broadcasters to have access to the courtroom during the trial for the purpose of recording any portion of the proceedings and/or exhibits; indeed, from the outset, the broadcasters have sought only to be permitted to inspect and copy the tape exhibits in the custody of the Clerk in a manner that would not disturb the progress of the *Mitchell* trial. Thus, the broad policy and constitutional considerations set forth in cases such as *Estes*, *supra*, which have caused the courts to prohibit the televising and/or recording of certain judicial proceedings—namely, the alleged injection of irrelevant factors into court proceedings; the potential impact on jurors; the impairment of the quality of testimony in criminal trials; the additional responsibilities placed on the trial judge; the impact on the defendant (*see Estes*,

there anything in the broadcasters' submission which is inconsistent with the assertion by them or others (including the Petitioner) of rights, if any, under the copyright laws. The submission to the contrary in the Petitioner's brief (at 35-37) is inexplicable.

supra, 381 U.S. at 544-49)—are now and have been from the inception of this case totally immaterial to the broadcasters' request to copy the tape exhibits at the close of each day's session or, alternatively, at the end of the *Mitchell* trial and at a time and place convenient to the Clerk of the District Court and his staff.*

Moreover, the argument in Petitioner's brief that the rule against recording judicial proceedings is based, in part, "on the further consideration that commercial dissemination of aural recordings of a trial or an appellate argument would be undignified and would detract from the solemnity appropriate to judicial proceedings" (Pet. Br. 33-34) is not only irrelevant to the instant case for the reasons discussed above but also totally unsupported by any of the cases cited by the Petitioner. Once again, review of the cases referred to by Petitioner in support of his argument reveals their inapposite nature; not one of them either involves or even treats the question, which we believe in any case to be immaterial to the instant action, of the commercial dissemination of aural recordings of judicial proceedings.**

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* So that there is no possibility of misunderstanding, most broadcasters, including those submitting this brief, continue to believe that the *Estes* case was wrongly decided, and that, in any event, technology developed since the *Estes* ruling should now, in an appropriate case, lead to a different result. That issue, of course, is not presented by this case.

** *See* Pet. Br. at 33: *Amsler* v. *United States,* 381 F.2d 37, 53 (9th Cir. 1967) [defendant held not to have been denied a public trial by reason of trial judge's denial of his right to tape record the proceedings]; *Hudson* v. *State,* 108 Ga. App. 192, 132 S.E.2d 508, 511 (1963) [placing radio station's recording device near defendant and her counsel held to have "prejudice[d] the rights of the defendant to a fair and impartial trial and . . . hinder[ed] the defendant and her counsel in the conduct of her defense."]; *Bisignano* v. *Municipal Court,* 237 Iowa 895, 23 N.W.2d 523, 532 (1946) *cert. denied,* 330 U.S. 818 (1947) [recording and subsequent broadcast of contempt proceedings brought against petitioner, although not approved of by court, held not to prejudice nor violate petitioner's constitutional rights]; *State* v. *Cox,* 188 Kan. 500, 363 P.2d 528 (1961) [the permitting of recording and subsequent broadcast of the appointment of counsel and the setting of bond, although not approved of by the court, held not to be reversible error].

Similarly lacking in relevance or merit is Petitioner's reliance on rules promulgated in a number of federal district courts which prohibit the copying of tape recordings made by court reporters during the course of judicial proceedings. (Pet. Br. 34-35, nn. 24 & 25) As the relevant statute (28 U.S.C. § 753(b) (1970)) and legislative history reveal (1965 *U.S. Code Cong & Ad. News* 2905), such tape recordings by court reporters have been permitted by Congress only for the limited purpose of augmenting the accuracy of reporters' stenographic transcriptions so as "to safeguard the rights of individuals before the court." (*Id.* at 2906) We reiterate that the broadcasters do not seek nor have they ever sought in this case the right to tape or make copies of any tapes (if they exist) of the actual proceedings of the *Mitchell* trial. The considerations giving rise to judicial prohibitions of copying court reporters' tape recordings of court *proceedings* are therefore immaterial to the instant request by the broadcasters to copy tape *exhibits* played in open court and introduced in evidence at the *Mitchell* trial.

Additional judicial support for the rejection in the opinions of both the Court of Appeals and Judge Gesell of Petitioner's artificial distinction between documentary and non-documentary public records may be found in cases such as *Menge* v. *City of Manchester,* 113 N.H. 533, 311 A.2d 116 (1973), in which the Supreme Court of New Hampshire permitted copying of taped public records although identical written records were available, and *Ortiz*

v. *Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971), in which the Supreme Court of New Mexico held that the county chairman of a political party was entitled to be furnished with a copy of a magnetic tape of the county's voter registration records even though a written record also existed. The court in *Ortiz* noted:

> "We are unable to understand why the right to inspect public records should not carry with it the benefits arising from improved methods and techniques of recording and utilizing the information contained in these records, so long as proper safeguards are exercised as to their use, inspection and safety.
>
> • • •
>
> "We fail to understand how it can be said the inspection and copying of information contained on a printed and written affidavit of registration, which is a public record, is proper, but the inspection and copying of this identical information from the 'working master record' tape, which is also a public record, constitutes an invasion of the privacy of the individual named in and identified by this information. Nothing said or reasonably suggested in MacEwan v. Holm, 226 Or. 27, 359 P.2d 413, 85 A.L.R.2d 1086 (1961), cited by respondent, supports any claim that the information contained in a written public record becomes confidential, or cloaked with a protection of privacy, upon being converted into a reproducible form on a magnetic tape, which is also a public record." (483 P.2d at 501-02)

Further support for the rulings by Judge Gesell and the Court of Appeals may be found in both the Federal Rules of Appellate Procedure, which clearly establish that

exhibits are judicial records,* and the *Manual for the Clerks of the United States District Courts* prepared by the Judicial Conference pursuant to its authority under 28 U.S.C. § 457 (1970). The *Manual* specifically provides for the retention of all materials accumulated during the course of "cases involving crimes of significance in the history of the country. . . ." (*Manual, supra*, Exhibit 2 (Ref. 1301.4) at p. 2 (1954)) Such a category of cases is, as Judge Bazelon concluded, "a category into which the Watergate case readily falls." (Pet. App. 12a; footnote omitted) As the *Manual* explains:

> "The dockets and minutes of the court and the dockets of the commissioners and magistrates and of the grand juries, as arms of the court, provide a complete summary of criminal proceedings and should in no case be disposed of. *To secure a more complete picture of proceedings and incidence of crime than is afforded*

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* The Federal Rules of Appellate Procedure explicitly include all exhibits, *including non-documentary exhibits*, as part of the judicial records of the District Court. Thus, Rule 10(a) of the Federal Rules of Appellate Procedure provides that:

> "(a) Composition of the Record on Appeal. *The original papers and exhibits filed in the district court*, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court *shall constitute the record on appeal in all cases.*" (emphasis added)

Fed.R.App.P. 11(a) provides, *inter alia*, that,

> "The record on appeal, *including the transcript and exhibits necessary for the determination of the appeal*, shall be transmitted to the court of appeals . . . ." (emphasis added)

Fed.R.App.P. 11(b) provides, *inter alia*, that,

> "Documents of unusual bulk or weight and *physical exhibits other than documents* shall not be transmitted by the clerk unless he is directed to do so by a party or by the court of appeals." (emphasis added)

See also Allen v. *Lackey, supra*, where the Supreme Court of Oklahoma noted that exhibits "are a part of the court's records and as such are in the custody of and subject to the control of the court." (188 P.2d at 217)

by the docket and minute entries, in those cases involving crimes of significance in the history of the country a full record of the case should be retained. This schedule provides for the retention of cases of continuing value as documentation of significant historical movements in the country and of the development of and variations in judicial procedures in the criminal area of the trial courts. It provides for the disposal of all other cases filed since December 31, 1911." (*Id.* at p. 2) (emphasis added)*

As both Judge Gesell and the Court of Appeals correctly held, such strongly worded guidelines must supersede the normally applicable local rules of the District Court for the District of Columbia cited in the Petitioner's brief (at 20, n.9) which permit the Clerk to "destroy or otherwise dispose of those exhibits" which a party fails to repossess at the conclusion of a case. *Rules of the United States District Court for the District of Columbia*, Rule 2-10(d). It understates the point to say that reliance upon such a rule by Mr. Nixon evinces a total disregard for the magnitude and historical significance of the crimes

* In the Schedule incorporated by reference in the *Manual*, the clerks are explicitly ordered not to dispose of the following kinds of records described as "Records of Continuing Value":

"6. Case papers and documentary exhibits filed with cases of crime or conspiracies to commit crimes, including related misprisons and accessories after the fact and court reporters' transcripts of proceedings whether filed in or outside the case file, consisting of items a-k below. . . .

a. *Crimes involving the President and Vice President of the United States, members of and delegates to Congress, judges and other officers appointed by the President*, States and territorial governors and *cabinet officials*, agents of foreign states, prisoners of war, internees, alien enemies, and persons aiding in the escape of or harboring internees, prisoners of war, or enemy aliens." (*Manual*, *supra* at pp. 4-5, item 6(a); emphasis added)

held by the jury in the *Mitchell* trial to have been committed by the defendants.*

As the foregoing discussion demonstrates, there is overwhelming support at common law and in local court rules in support of permitting the copying and later broadcasting to the public of the tapes introduced as court exhibits in the *Mitchell* trial. As the Court of Appeals concluded:

> "Appellants seek to vindicate a precious common law right, one that predates the Constitution itself. While the courts have sanctioned incursions on this right, they have done so only when they have concluded that 'justice so requires.' To demand any less would demean the common law right." (Pet. App. 15a) (Footnotes omitted)

II.

The Decision of the Court of Appeals Is Consistent With First and Sixth Amendment Precepts

In light of its reliance on common law principles, the decision of the Court of Appeals did not reach the question of whether the First or Sixth Amendments would, in and of themselves, require a finding that the refusal to make the tapes publicly available was unconstitutional. Nor, in light of the Court of Appeals' decision, do we believe this Court need reach that question. However, we do submit that First and Sixth Amendment considerations add considerable weight to the opinion of the Court of

* "Nor", as the Court of Appeals correctly observed, "has [Petitioner] justified classifying documentary exhibits in historically significant cases as judicial records but denying that classification to non-documentary exhibits in such cases or to all exhibits in cases not of historical impact." (Pet. App. 13a)

Appeals and, on that basis, urge the Court to consider them in reviewing this case.*

The First Amendment

The First Amendment principles which we believe should guide this Court with respect to this application were set forth most recently by the Court in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In that case, the Supreme Court of Georgia had held that the father of a deceased rape victim could recover damages for invasion of privacy against a broadcaster on the basis of its identification of the rape victim in its news coverage. *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. 60, 200 S.E.2d 127 (1973). In its opinion, the Georgia Court had held that "[t]here simply is no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection." (200 S.E.2d at 134) Notwithstanding the claims of privacy raised in that case, this Court reversed. In Justice White's opinion for the Court, he observed that:

> "In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and

* If this Court were to differ with the Court of Appeals as to the nature of the common law rules at issue, we would urge it to consider the above constitutional arguments, each of which was made from the time the broadcasters first filed their initial application with Judge Sirica (App. 12-13), as a separate and independent basis for affirming the ruling of the Court of Appeals.

> documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.* See *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966)." (420 U.S. at 491-92; emphasis added)

And that:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. *Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.* In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." (420 U.S. at 495; emphasis added)

Cox Broadcasting thus demonstrates the need for affording extraordinary weight to First Amendment considerations in the Court's determination of this appeal. If the

broadcasting of the name of a deceased rape victim contained in court records is "a public benefit" and the freedom to broadcast that information is "of critical importance to our type of government", surely the broadcasting of the White House tapes introduced in evidence in the *Mitchell* trial is no less so—and, in fact, far more so. And, if a duly adopted state statute designed to afford privacy to rape victims and their families cannot withstand First Amendment scrutiny in situations in which the names of the victims are contained in court records, it is difficult to comprehend how a judicial ban on release of publicly played court exhibits can withstand such scrutiny.

To this, Mr. Nixon responds by observing (accurately but irrelevantly) that the Georgia statute at issue in *Cox* "did not bar the Court from disclosing the rape victim's name" and that the restraint in *Cox* "was one on publication of information that the television station already had or could readily obtain from public records." (Pet. Br. 43) The missed point, however, is that in this case as well, the "information" sought is contained in the public court records.

Nor may *Cox Broadcasting* be distinguished on the ground that in it this Court reserved judgment as to a "refusal of access to official court records, 420 U.S. at 496 n.26." (Pet. Br. 43) What the Court reserved decision on was the constitutionality of state policies prohibiting *any* access to certain types of records historically kept closed—*e.g.*, juvenile proceedings* or the like. What the Court did not reserve decision on was the right of the press to broadcast information obtained from openly kept court

* In *Oklahoma Publishing Co.* v. *District Court*, 97 S.Ct. 1045 (1977) the Court made clear that when such proceedings are held in public, there may be no restrictions as to what is printed with respect to them.

records, even though powerful competing societal claims could be made that such records should not be broadcast and even though "sensibilities" would be disturbed by their broadcast. Precisely the same reasoning should, we believe, lead to the conclusion that the broadcasting of the tape exhibits should not be barred when the exhibits themselves are, and have been, open to the public.*

Judge Gesell's opinion rejected the broadcasters' First Amendment argument (prior to the *Cox Broadcasting* ruling) on the ground that cases such as *Pell* v. *Procunier*, 417 U.S. 817 (1974), which held that the press had no unique right of "access" to prisons to interview inmates, demonstrated that the press had no First Amendment right of access to the court exhibits in this case. (Pet. App. 37a-38a) *Cox* aside, the difference between the cases is, in our view, precisely the difference between courtrooms and prisons. The press and the public generally have a long recognized right to access to courtrooms, to court exhibits and the like—and "to report whatever occurs in open court. . . ." *Estes* v. *Texas, supra*, 381 U.S. at 541-42; *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). But prisons are not freely "open" to the public or the press and the holding of this Court in *Pell* is no more than that they need not be opened at the request of the press.

In fact, to cite *Pell* as authority for the denial of "access" to court records is to read it in a fashion contrary to the

* The suggestion of Mr. Nixon (Pet. Br. 41) that the broadcasters' First Amendment claim is one seeking "'the unrestrained right to gather information'", as in *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965) is simply inexplicable in the context of a case involving public court records. So too is the suggestion that the broadcasters are asking the Court not for access to public court records, but for the "court to provide . . . reproductions" of the tapes (*id.*); the broadcasters have never asked the court to reproduce for them the tape exhibits at issue, but simply to *permit* reproduction of those exhibits.

holding of this Court in *Cox Broadcasting* that:

> "With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." (420 U.S. at 492)

If this Court had believed the words "prisons" could properly have been substituted for the words "judicial proceedings" and "trials", we submit that the *Pell* ruling would unanimously have been decided in the manner urged by the dissenting justices; that the majority did not so agree hardly suggests that the press and the public may now be relegated to the limits on trial coverage that exist with respect to prison coverage.

The Sixth Amendment

Judge Gesell's decision of December 5, 1974 concluded that the Sixth Amendment lent support to his conclusion that "the public should have the opportunity to hear [the tapes]." As phrased by Judge Gesell:

> "The courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens. It was in just such situations that the Sixth Amendment was intended to have its greatest thrust. As the Supreme Court has succinctly stated, 'what transpires in the courtroom is public property.' *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). Only in this fashion can arbitrary judicial authority be prevented." (Pet. App. 42a)

We believe Judge Gesell's decision was, in this respect, wholly correct. The Sixth Amendment to the Constitution

provides for "public trial" of criminal cases. As such it requires that the state, in a criminal prosecution, conduct the trial in a forum open to members of the public who wish to attend. *Davis* v. *United States*, 247 F. 394 (8th Cir. 1917). One purpose of the right is to protect defendants against the evils of the Star Chamber. A broader —and also long-recognized—purpose is that of permitting the public to know continually and contemporaneously what transpires in its courts. As one district court has observed, "Public trial is essentially a right of the accused. . . . There is, however, a correlative right to preserve the public's right to be informed about criminal prosecutions in the best interests of all citizens." *United States ex rel. Mayberry* v. *Yeager*, 321 F.Supp. 199, 204 (D.N.J. 1971). *See also State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio 457, 351 N.E.2d 127, 133-34 (1976).

Sixth Amendment rights have thus often been vindicated in actions commenced by the press, as well as by a threatened defendant. *See, e.g., Gannett Co. Inc.* v. *DePasquale*, 55 App. Div. 2d 107, 389 N.Y.S.2d 719 (4th Dept 1976); *Oliver* v. *Postel*, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S. 2d 407 (1972)*; *E. W. Scripps Co.* v. *Fulton*, 100 Ohio App. 157, 125 N.E.2d 896 (1955); *Phoenix Newspapers, Inc.* v. *Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966); *Phoenix Newspapers, Inc.* v. *Jennings*, 107 Ariz. 557, 490 P.2d 563 (1971); *Johnson* v. *Simpson*, 433 S.W.2d 644 (Ky. 1968). And in numerous other cases, the public's right to a public trial has been held to govern over a defendant's desire for a less open trial. *See, e.g., State* v. *Allen*, 73 N.J. 132, 373 A.2d 377 (1977); *Lyles* v. *State*, 330 P.2d 734 (Okla. Crim. App. 1958); *Cox* v. *State*, 3 Md.

* The *Postel* decision suggests that there is considerably less vitality in cases such as *People* v. *Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954) and *United Press Associations* v. *Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954) than Petitioner appears to believe there is.

App. 136, 238 A.2d 157 (Spec. App. 1968); *People* v. *Holder*, 70 Misc.2d 31, 332 N.Y.S.2d 933 (Sup.Ct. Queens Co. 1972). *See also In re Oliver*, 333 U.S. 257, 270 (1948). As summarized by the Court in *Oxnard Pub. Co.* v. *Superior Court*, 68 Cal. Rptr. 83, 91-92 (Ct. App. 1968):

> "A properly-conducted public trial, in addition to serving the interest of the accused and his connections and the interest of the victim and his connections, maintains the confidence of the community in the honesty of its institutions, in the competence of its public officers, in the impartiality of its judges, and in the capacity of its criminal law to do justice. Public trial has been a basic tenet of our legal heritage, at least since the abolition of the Star Chamber three hundred years ago. Secrecy, on the other hand, is the antithesis of the orderly operation of a public institution, breeding either suspicion, distrust, rumor, and outrage, or apathy, indifference, and neglect. Suppose a charge of bribery against a state senator, tax assessor, or member of Congress; suppose a charge of conflict of interest against a councilman, supervisor, or commissioner; suppose the prosecution of the spouse of a judge or the relative of a prominent politician. In each of these cases public confidence in the administration of justice is directly served by the procedure of an open trial which exposes to the scrutiny of the public the conduct of the case and the actions of public officers, police, prosecutors, and trial judge in the performance of their duties. By following the course of events the public is able to evaluate the competence and fairness with which the case is handled. At the conclusion of such a trial deficiencies or excesses in the conduct of public affairs have been exposed for remedial action, and, normally, the public is satisfied that the matter has received an equitable and proper disposition."

The requirement imposed by the Sixth Amendment to conduct a public trial is subject only to the narrowest limitations. A court may—within certain narrowly defined limits—exclude certain members of the public from a trial under special circumstances and for limited periods of time related to the purpose of the exclusion. Thus, recognized purposes which may be served by the exclusion of certain members of the public are preserving courtroom order, *United States* v. *Kobli*, 172 F.2d 919, 922 (3d Cir. 1949); *United States ex rel. Orlando* v. *Fay*, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966); *Davis* v. *United States*, *supra*, 247 F. at 395 (1917); insuring the safety of the witness and parties, *United States ex rel. Smallwood* v. *LaVallee*, 377 F. Supp. 1148 (E.D.N.Y. 1974), *aff'd*, 508 F.2d 837 (2d Cir.), *cert. denied*, 421 U.S. 920 (1975); *People* v. *Devine*, 80 Misc.2d 641, 364 N.Y.S.2d 71 (Sup. Ct. Kings Co. 1974); *People* v. *Hinton*, 31 N.Y.2d 71, 73-77, 286 N.E.2d 265, 334 N.Y.S.2d 885, 887-89 (1972), *cert. denied*, 410 U.S. 911 (1973); *People* v. *Hagan*, 24 N.Y.2d 395, 397-99, 248 N.E.2d 588, 300 N.Y.S.2d 835, 837, *cert. denied*, 396 U.S. 886 (1969); *United States ex rel. Bruno* v. *Herold*, 408 F.2d 125, 127 (2d Cir. 1969), *cert. denied*, 397 U.S. 957 (1970); and protecting the morals of the public, *United States* v. *Kobli*, *supra*. *See also United States* v. *Lopez*, 328 F. Supp. 1077, 1087-88 (S.D.N.Y. 1971). These exceptions, however, are carefully defined and must be sparingly applied. As the Court of Appeals for the Third Circuit has concluded:

> "It has always been recognized that any claim of practical justification for a departure from the constitutional requirement of a public trial must be tested by a standard of strict and inescapable necessity." (*United States ex rel. Bennett* v. *Rundle*, 419 F.2d 599, 607 (3d Cir. 1969))

Of course, we have never suggested—and we do not now—that Judge Sirica in any sense, conducted the *Mitchell* trial in a secret or closed manner. However, we do urge upon the Court the proposition, as initially set forth by Judge Gesell, that the Sixth Amendment requires that court exhibits be made available to the public generally —and not be limited to those who are fortunate enough to be permitted to attend in the courtroom. In considering the correctness of the ruling of the Court of Appeals and of Judge Gesell that the tapes should be heard by the public, Sixth Amendment considerations, as well as those stemming from the First Amendment, may and should be considered by this Court.

III.

The Court of Appeals Correctly Rejected Arguments Made Against Permitting the Broadcasters to Copy the White House Tapes Introduced in Evidence.

The decision of the Court of Appeals recognized that the right to inspect and copy court records, including exhibits, was not an absolute one. It therefore carefully considered each of the arguments then asserted against the broadcasters' application, rejecting each of them. In all respects, we believe the decision of the Court of Appeals as to each of these arguments was correct.

1. *The Argument Based Upon Executive Privilege*

The argument asserted most vigorously and at greatest length in Mr. Nixon's brief has been asserted by him, in one or another form, since the commencement of this proceeding. In its current form, the argument is that the "deference" due subpoenaed presidential materials makes

distribution of these tapes "inappropriate". (Pet. Br. 47) Judge Gesell's response to this submission was as follows:

> "Former President Nixon is before the jury as an alleged co-conspirator and his acts, as reflected in the tapes, are pertinent to the theory of the case on which the Special Prosecutor is proceeding. The Court has carefully reviewed transcripts of the tapes in issue. From this review it is apparent that Judge Sirica has assiduously removed extraneous material, including topics relating to national security and considerable irrelevant comment relating to persons not on trial. Only portions of the tapes strictly germane to the criminal proceeding have been played to the jury. Moreover, the portions of the tapes here in issue are now of public record. Although former President Nixon has been pardoned, he has standing to protest release by the Court but he has no right to prevent normal access to these public documents which have already been released in full text after affording the greatest protection to presidential confidentiality 'consistent with the fair administration of justice.' *United States* v. *Nixon, supra,* 94 S.Ct. at 3111. His words cannot be retrieved; they are public property and his opposition is accordingly rejected." (Pet. App. 40a-41a)

The Court of Appeals, concluding that Judge Gesell had not abused his discretion in so ruling, observed that:

> "In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court spoke of the 'high degree of deference' owed to Presidential conversations. The context of the Supreme Court's statements, however, make clear that its primary concern was with safeguarding the *confidentiality* of such conversations, in order to pro-

vide 'protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.' Thus the Court stated,

> '[T]he District Court has a very heavy responsibility to see to it that Presidential conversations, *which are either not relevant or not admissible,* are accorded that high degree of respect. . . .'

And again:

'[T]he District Judge will at all times accord to Presidential records that high degree of deference . . . and *will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material. . . .*'" (Pet. App. 24a-25a; emphasis in original) (Footnotes omitted)

Since the tapes played at trial are, by definition, not confidential, the Court of Appeals concluded that it was consistent with this Court's ruling in *United States* v. *Nixon* for the tapes to be publicly disseminated.*

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* This Court's recent rejection of Mr. Nixon's claims of executive privilege in *Nixon* v. *Administrator of General Services,* 45 U.S.L.W. 4917 (U.S. June 28, 1977) demonstrates the validity of both Judge Gesell's and the Court of Appeals' reading of *United States* v. *Nixon, supra,* in rejecting Mr. Nixon's claims of Presidential privilege in the present case. In *Nixon* v. *Administrator of General Services, supra,* the Court was called upon to adjudicate Mr. Nixon's claim of Presidential privilege "only with respect to the process by which the materials will be screened and catalogued by professional archivists." (45 U.S.L.W. at 4924) In holding that the Presidential Recordings and Materials Preservation Act ("Act") did not violate the Presidential privilege asserted by Mr. Nixon, the Court clearly demonstrated that its primary concern in *United States* v. *Nixon* was with protecting the confidentiality of sensitive Presidential conversations found on those tapes which had been subpoenaed in connection with the *Mitchell* trial. Indeed, the Court explicitly analogizes the screening process provided for by the Act to the *in camera* inspection employed by the District Court in the *Mitchell* trial, concluding "that the screening process contemplated by the Act will not constitute a more severe intrusion into *Presidential confidentiality* than the *in camera* inspection by the District Court approved in *United States* v. *Nixon*. . . ." (45 U.S.L.W. at 4925; emphasis added) Furthermore, the Court concluded "there is no reason to believe that the restriction on public access ultimately established by regulation will not be adequate to preserve *executive confidentiality*". (45 U.S.L.W. at 4924; emphasis added) Since the interests in "executive confidentiality" (*id.*) which have been considered by this Court in *United States* v. *Nixon, supra,* and *Nixon* v. *Administrator of General Services, supra,* have already been satisfied in the present case by reason of the District Court's initial screening of the tapes prior to their introduction in evidence at the *Mitchell* trial, Mr. Nixon's claim of executive privilege is utterly unfounded.

To all this, Mr. Nixon urges that broadcasting the tapes "will constitute a far more serious intrusion on the sensibilities of those whose voices appear on the tapes than any publication of transcripts or reporting of their contents." (Pet. Br. 50) So that issue may be joined with precision, we agree that broadcasting the tapes may be more offensive to the "sensibilities" of those whose voices are heard in conversations deemed admissible to prove their participation in a criminal conspiracy.* We simply do not believe deference to such sensibilities can properly overcome the overriding interest of the public in learning what took place in the White House when the taped conversations occurred or what transpired at the *Mitchell* trial when the taped conversations were introduced in evidence. Nor do we believe that an unindicted co-conspirator who tapes his conversations with his con-

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* It is true that those individuals—including the head of a foreign state—that Mr. Nixon chose to insult in crude and vulgar language on the tapes may indeed resent Mr. Nixon's slurs. The insults are, in any event, already public knowledge and while repetition may well be distressing, such distress can hardly be deemed sufficient cause to bar the public from hearing the court exhibits.

federates (some of whom are later convicted of crimes which are proved by the tapes themselves) stands in the most appealing position to protest intrusions into the sensibilities of anyone.

The tapes at issue in this case are unique documents of preeminent historical—and current—interest. The remarkable number of books, articles, movies and television shows which the Watergate affair has yielded stands as testimony to the abiding interest of the public in materials which in some way explain why and how Watergate occurred.* The overriding historical importance of the tapes has been recognized by Congress and cited by this Court as at least one appropriate basis for Congressional passage of the Presidential Recordings and Materials Preservation Act. *Nixon* v. *Administrator of General Services, supra*, 45 U.S.L.W. at 4924-25. In light of the importance of the materials in question to the public's ability to understand the past and thus act to prevent similar occurrences in the future, Petitioner's expressed sensitivity to the privacy of those he surreptitiously recorded is of little persuasive weight.

2. *The Arguments of "Property" Rights*

An additional argument proffered by Mr. Nixon relates to his supposed personal "property" rights in the tapes. No claim of ownership of the tapes is made in this case by Mr. Nixon; instead the far more amorphous claim of a

* *See e.g.*, W. Safire, *Before the Fall* (1975); T.H. White, *Breach of Faith: The Fall of Richard Nixon* (1975); J. Breslin, *How The Good Guys Finally Won: Notes from an Impeachment Summer* (1975); J. Dean, *Blind Ambition* (1976); L. Jaworski, *The Right and The Power* (1976); J. Lukas, *Nightmare: The Underside of the Nixon Years* (1976); F. D. Thompson, *At That Point in Time: The Inside Story of the Senate Watergate Committee* (1975); R. Woodward and C. Bernstein, *The Final Days* (1976).

"property interest" is asserted.* (Pet. Br. 24-26) It is an "interest" based on cases so inapposite that their very nature demonstrates the frailty of the claim.

For example, "perhaps the closest reported case on its facts to this one" (Pet. Br. 25) is said to be *King* v. *King*, 25 Wyo. 275, 168 P. 730 (1917). *King* v. *King* involved a marital dispute in which apparently amorous and surely compromising letters written by a husband were intercepted by his wife; they were introduced under seal in their divorce proceedings. After the proceeding was completed, the former wife sought—and was denied—the right to copy the sealed, intimate exhibit for the purpose of exposing her former husband's misdeeds to a secret organization he belonged to called the "Eastern Star Lodge." It understates the point to observe that were *King* v. *King* actually the "closest reported case on its facts to this one", it could surely be said that this is a case of first impression.

Other cases relied upon by Mr. Nixon to establish property rights are also inapposite. Three statutory copyright cases are relied upon, each of which involved serious creative efforts by the party asserting the right.** Typical

* The determination of whether or not Mr. Nixon has legal title to the tapes was not decided by this Court in its recent decision in *Nixon* v. *Administrator of General Services, supra*, because it was deemed "irrelevant". (45 U.S.L.W. at 4922, n.8) As the Court observed:

> "We see no reason to engage in the debate whether [Mr. Nixon] has legal title to the materials. . . . Such an inquiry is irrelevant for present purposes because [the Act] assures [Mr. Nixon] of just compensation if his economic interests are invaded, and even if legal title is his, the materials are not thereby immune from regulation." (45 U.S.L.W. at 4922, n.8)

** *King* v. *Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963); *Columbia Broadcasting System, Inc.* v. *Documentaries Unlimited, Inc.*, 42 Misc.2d 723, 248 N.Y.S.2d 809 (Sup.Ct. N.Y.Co.

is the well-known copyright case of *Metropolitan Opera Ass'n, Inc.* v. *Wagner-Nichols Recorder Corp., supra,* which concluded that:

> "To refuse to the groups who expend time, effort, money and great skill in producing these artistic performances the protection of giving them a 'property right' in the resulting artistic creations would be contrary to existing law, inequitable, and repugnant to the public interest. . . . Equity will not bear witness to such a travesty of justice; it will not countenance a state of moral and intellectual impotency." (199 Misc. at 882, 101 N.Y.S.2d at 497-98).

We think we do Mr. Nixon and his associates no injustice if we urge that the "artistic creations" reflected on the White House tapes are distinguishable by their nature from those involved in the Metropolitan Opera.*

1964); *Metropolitan Opera Ass'n, Inc.* v. *Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup.Ct. N.Y.Co. 1950). (Pet. Br. 24)

* This Court's recent decision in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4594 (U.S. June 28, 1977) is similarly inapposite to the instant case. In *Zacchini, supra,* this Court held that the news media are not constitutionally privileged under the First and Fourteenth Amendments to broadcast an entertainer's entire act (*Zacchini* involved a 15 second "human cannonball" act) on a news program without his consent and without providing compensation. In language which clearly underscores the nature of the differences between the amorphous "property interests" asserted by the Petitioner in the present case and those property interests involved in the *Zacchini* decision, the Court explained its holding as follows:

> "The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance. As the [lower] court recognized, *this act is the product of petitioner's own talents and energy, the end result of much time, effort and expense.* Much of its economic value lies in the 'right of exclusive control over the publicity given to his performance'; if the public can see the act for free on television, they will be less willing to pay to see it at the fair.

Nor do cases involving the conceded property right in private letters (Pet. Br. 24-25) advance or bear on this case.* Such cases do not involve court records or exhibits; they do not involve letters introduced into evidence (excepting only the salacious letters intercepted by Mrs. King in *King* v. *King*); they are simply irrelevant to this case.

> [Footnote omitted.] The effect of a public broadcast of the performance is similar to preventing petitioner from charging an admission fee. . . . *Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer.* Thus in this case, [the State] has recognized what may be the strongest case for a 'right of publicity'—*involving not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.*" (45 U.S.L.W. at 4957) (emphasis added)

An additional consideration distinguishing the policies underlying the *Zacchini* decision from those which should govern the instant case may be found in this Court's recognition in *Zacchini* that the protection of a performer's right of publicity "provides an economic incentive for him to make the investment required to produce a performance of interest to the public." (45 U.S.L.W. at 4957) It is certainly beyond dispute that the present case does not require this Court to provide any such incentives to the Petitioner.

* However, as this Court was careful to observe in *Nixon* v. *Administrator of General Services, supra,* "[*i*]*t has been accepted* at least since Mr. Justice Story's opinion in *Folsom* v. *Marsh*, 9 Fed. Cas. 342, 347 (1841), that *regardless of where legal title lies,* 'from the nature of the public service or the character of the documents embracing historical, military or diplomatic information, it may be the right, and even the duty of the government, to give them publicity, *even against the will of the writers.*'" (45 U.S.L.W. at 4922, n.8; emphasis added)

In *Folsom* the court held the assignees to be possessors of presidential letters protected by copyright. However, the *Folsom* court determined that even such an otherwise valid statutory copyright claim may be subordinated to an overriding public interest in copyrighted materials. If a statutory right may be so subordinated, it should hardly be doubted that a spongy non-statutory claim such as the one Mr. Nixon asserts in this case must also give way.

3. *The Privacy Argument*

Despite the fact that the White House tapes at issue herein are public records which were played in open court and introduced in evidence in the *Mitchell* trial, Mr. Nixon makes the privacy argument to this Court which he has made unsuccessfully from the outset of this case—namely, that he "retains a privacy interest in the taped conversations, which would be infringed if aural copies of the conversations were publicly distributed."* (Pet. Br. 26)

A basic assumption underlying Mr. Nixon's privacy argument is the assertion that "Mr. Nixon plainly had a protectable privacy interest in the tapes prior to their use in the criminal trial." (Pet. Br. 27) But the Court's recent discussion of Mr. Nixon's privacy claims in *Nixon* v. *Administrator of General Services, supra,* seriously undercuts this cornerstone of Mr. Nixon's privacy argument in the present case. First, while it is true that this Court in *Nixon* v. *Administrator of General Services, supra,* recognized that "at least when government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights *in matters of personal life unrelated to any acts done by them in their public capacity*" (45 U.S.L.W. at 4926; emphasis added), it is beyond dispute that the White House tapes which were initially screened by the District Court and subsequently introduced in evidence at the *Mitchell* trial are related entirely to Mr. Nixon's official conduct of his Presidency and do not in any way infringe or touch upon "matters of personal life unrelated to any acts done by [Mr. Nixon] in [his] public capacity." (*Id.*) Indeed,

* As the Court of Appeals observed, Petitioner has conceded that the infringement of such an amorphous "privacy interest" could not be the basis of a cause of action of Mr. Nixon or others for invasion of privacy. (*See* Pet. App. 22a, n.54)

this Court has noted that such matters involved "only a small fraction of the materials of [Mr. Nixon's] Presidency. . . ." (45 U.S.L.W. at 4926) Thus, those narrowly defined privacy expectations of the Petitioner in his personal communications which this Court recognized in *Nixon* v. *Administrator of General Services, supra*—namely, "'private communications between [him] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files'" (45 U.S.L.W. at 4926; citation omitted)—are totally immaterial to Mr. Nixon's privacy claims in the present case.

Even more telling is this Court's rejection of Mr. Nixon's privacy arguments as to the tapes Mr. Nixon has already revealed to the public. Thus, the Court stated with respect to such disclosed materials that "of course, [Mr. Nixon] cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public." (45 U.S.L.W. at 4926) Mr. Nixon is thus barred from asserting any privacy claims in the present case as to those portions of the taped exhibits introduced in evidence at the *Mitchell* trial—the only tapes now sought to be inspected and copied by the Respondents.*

We submit that this Court may appropriately deny Mr. Nixon's privacy claims in the present case solely on the

* We have not attempted to determine what portion of the tapes introduced as exhibits were disclosed to the public by Mr. Nixon prior to the *Mitchell* trial. However, one indication of the extent of the overlap can be found in the following statement made by Mr. Nixon during the course of his opposition to the subpoena *duces tecum* issued to him by the Special Prosecutor in connection with the *Mitchell* trial.

> "'[portions] of twenty of the conversations described in the subpoena have been made public and no claim of privilege is advanced with regard to those Watergate related portions of those conversations . . .'" *United States* v. *Mitchell*, 377 F. Supp. 1326, 1328 n.3 (D.D.C. 1974).

basis of the Court's analysis of the privacy question in *Nixon* v. *Administrator of General Services, supra.* However, we also believe that the Court of Appeals' rejection of the Petitioner's arguments is similarly dispositive;*

* Petitioner's reliance upon Fourth Amendment cases such as *Katz* v. *United States,* 389 U.S. 347 (1967) and *Silverman* v. *United States,* 365 U.S. 505 (1961) (Pet. Br. 27) is misplaced. The present action does not involve any Fourth Amendment considerations, "[at] the very core [of which] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (*Silverman, supra,* 365 U.S. at 511) Regardless of how Mr. Nixon's vague privacy claims are defined, they do not come within the ambit of any privacy considerations arising out of the Fourth Amendment. As this Court observed in *Katz, supra*:

> "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." (389 U.S. at 350-51; emphasis in original) (Footnotes omitted)

Mr. Nixon's privacy argument is also unsupported by the Petitioner's curious reliance upon right-of-publicity cases such as *Price* v. *Hal Roach Studios, Inc.,* 400 F. Supp. 836 (S.D.N.Y. 1975) and *Ettore* v. *Philco Television Broadcasting Corp.,* 229 F.2d 481, 496 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956). (Pet. Br. 27-28), since the right of *publicity* at issue in *Price, supra,* is entirely immaterial to the right of *privacy* which has been raised as an issue by Mr. Nixon in the present case. (*See Price, supra,* 400 F.Supp. at 843-44)

Petitioner's reliance upon *Doe* v. *Roe,* 42 App. Div.2d 559, 345 N.Y.S.2d 560 (1st Dep't), *aff'd,* 33 N.Y.2d 902, 307 N.E.2d 823, 352 N.Y.S.2d 626 (1973), *cert. dismissed as improvidently granted,* 420 U.S. 307 (1975), is similarly misplaced. (Pet. Br. 28-29) *Doe, supra,* involved "the right of a former patient to restrain her analyst's disclosure, through the means of a commercial book, of certain confidential communications." (42 App.Div. at 560, 345 N.Y.S.2d at 561) None of the sensitive issues involved in *Doe, supra,*—namely, the breach of the physician-patient privilege; the confidentiality of the patient's communications recorded by the physician during the patient's psychotherapeutic treatment—are even remotely relevant to the broadcasters' rights to make copies of those tapes evidencing a criminal conspiracy by the holders of the highest offices of this nation which were played in open court and introduced in evidence in the *Mitchell* trial.

Finally, Mr. Nixon's citation to the Code of Judicial Conduct's rules with respect to the propriety of the recording of judicial proceedings and the corollary rights of a witness to refuse consent to having his or her testimony recorded (Pet. Br. 30-31) are, as we have discussed earlier in this brief, simply inapposite to the present case which involves the right of the broadcasters to make copies of judicial records in the form of *exhibits* and not the right to either contemporaneously record judicial *proceedings* or to make copies of such recordings.

accordingly, we quote this portion of its opinion in full:

> "Perhaps the most important point to be made about Mr. Nixon's privacy claim is that he is not seeking to protect an expectation of privacy. The tapes already have been played in a public forum. Rather, [Mr. Nixon] seeks to avoid only what he terms 'intrusion on the sensibilities of those whose voices appear on the tapes.' But as [Mr. Nixon] concedes, this is not the type of injury against which the law provides protection. The fact that neither the legislatures nor the courts have felt this interest worthy of protection suggests that it is not a substantial basis for infringing the common law right to inspect judicial records.
>
> "But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct. The embarrassment Mr. Nixon anticipates is largely that which results whenever misconduct or questionable conduct is exposed. If preventing this

'injury' justifies interfering with the public's right to inspect records, then the common law right can always be defeated in criminal cases.

"Beyond this, there are a number of factors unique to this case that militate in favor of Judge Gesell's decision. First, the conversations at issue relate to the conduct of the Presidency, and thus they are both impressed with the 'public trust', and of prime national interest. Second, the fact that the transcripts of the conversations already have received wide circulation makes this unlike a hypothetical case in which evidence previously accessible only to a few spectators will suddenly become available to the entire public. Finally, it seems likely that as a result of the Presidential Recordings and Material Preservation Act, the words and sounds at issue here will find a further entry way into the public domain.

"For all these reasons we are unable to conclude that Judge Gesell abused his discretion in rejecting the claim of privacy." (Pet. App. 22a-24a)

4. *The Argument Based Upon the Possibility of Reversal of Convictions in the Mitchell Trial*

The primary basis for Judge Sirica's denial of the broadcasters' application was his concern that should the decision in the *Mitchell* trial be reversed, the defendants' rights at retrial might be prejudiced by the broadcasting of the tapes. In light of the recent denial of certiorari by this Court with respect to the convictions of the defendants in the *Mitchell* trial and the publicly announced decision of the Special Prosecutor not to retry Mr. Mardian,* one might have thought that this issue at least was now removed from this case. Mr. Nixon, however, devotes 4 pages

* *See* discussion, *supra*, at 18 n*.

of his brief to the point (pp. 53-56), urging that while the "risk of retrials" in these now completed cases have been "substantially reduced" (p. 56), the opinion of the Court of Appeals remains irredeemably tainted by its conclusion that Judge Sirica erred in relying on that factor as his basis for not making the tapes now available. Such an argument is difficult to grapple with in much the same fashion it is often difficult to "prove" distasteful facts to congenital disbelievers. Suffice it to say, therefore, that unless Mr. Nixon's argument is that there will forever lurk the possibility of a retrial of his former associates on the basis of newly discovered evidence or the like and that the tapes presently sought to be copied may thus *never* be released, the *Mitchell* trial may surely be considered over and this objection, at least, to the release of the tapes may be deemed moot.

In any event, the decision of the Court of Appeals that Judge Sirica did not merely abuse his discretion in so ruling but misconceived the nature of that discretion is plainly correct. The three prongs of the Court's opinion were that the possibility of a new trial was too indefinite a basis to permit such a result;* that the material in this case all consisted of *admitted* evidence, not even the type of material generally considered a possible source of prejudice; and that (with the single exception of Mr. Haldeman's *pro forma* objection) the celebrated and well-counseled defendants had not even made such arguments on their own behalf. We believe these arguments are persuasive and correct.

* The recent developments described above in the *Mitchell* case confirm the wisdom of the Court's conclusion that claims asserted against the rights of the broadcasters and the public were far too speculative to withstand scrutiny.

CONCLUSION

We urge this Court to affirm the decision of the Court of Appeals permitting the broadcasters to copy the White House tapes played in open court and introduced in evidence in the *Mitchell* trial for the purpose of broadcasting them to the public.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO. INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. This Case Does Not Involve a Question of "Access" Within the Meaning of the Common Law Doctrine of Access to Judicial Records.

The respondents, like the court of appeals, cast the issue in this case as whether Mr. Nixon has made a sufficient showing of reasons to "overcome" a "long-established common law right" of the public to obtain copies of tape recordings used as evidence at a trial.

First, however, the Court must determine whether there *exists* any right, at common law or otherwise, to obtain copies of such recordings. Only if there exists such a right could a court of appeals properly compel a district court, two judges of which had refused to release the recordings for broadcast and other uses,[1] to disseminate the tapes at issue here.

In asserting such a right, the respondents repeatedly refer to the common law "right of access" to judicial and other public records. This case, however, is simply not a "right of access" case, as is conceded by respondent Warner. (Warner Br. 50.) There is no issue of "access" here because, as Warner itself recognizes, the contents of the tape recordings are not secret, they are not under seal, and they have been heard and reported on by members of the press and public who attended the trial. Warner might have added that, so far as the record shows, no one has applied for or been denied access to inspect the recordings. It is not *access* that the respondents seek, but *reproductions* of the

[1] Although both the court of appeals (Pet. App. 21a-25a) and the respondents (Warner Br. 86; NBC Br. 43, 54) speak as if Judge Gesell had exercised his presumed discretion to *release* the recordings, the fact of the matter is that he *denied* the applications. True, he rejected – erroneously, we believe – petitioner's position that the tapes should not be disseminated under any circumstances. But he was inclined to release the tapes only if "commercialization of the tapes or any undignified use of the materials [could] be minimized." (Pet. App. 44a.) No plan for dissemination of the tapes was ever proposed that satisfied these considerations, and thus Judge Gesell refused to permit their release. For the court of appeals to say (Pet. App. 21a) that the "question is whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes" is an erroneous characterization of Judge Gesell's decision.

tapes in a form suitable for broadcast and sale in the form of cassettes and phonograph records.

The respondents attempt to bring their claim within the common law "right of access" doctrine by arguing that the term "judicial records" includes subpoenaed recordings played to a trial jury, and that the term "access" necessarily includes copying. As we showed in our original brief, neither proposition is supported by the applicable case law. More fundamentally, the respondents' arguments find no sustenance in the rationale of the common law principle, which is that records of a court in a democratic society ought not to be kept secret. As stated in *Ex parte Drawbaugh*, 2 App. D.C. 404, 407-408 (1894) (emphasis added):

> "[A]ny attempt to maintain *secrecy*, as to the records of the court, would seem to be inconsistent with the common understanding of *what belongs to a public court of record*, to which all persons have the right of access, and to its records, according to long established usage and practice."

The respondents appear to recognize that materials subpoenaed for use as evidence at a criminal trial do not thereby become the property of the court. (Warner Br. 31; NBC Br. 21.) As the tapes do not belong to the court, and as there is no question here of keeping anything secret, the respondents' claimed right to copy these recordings finds no support in the common law doctrine of access to judicial records.

2. That Subpoenaed Recordings Are in The Custody of the Clerk Does Not Establish a Public Right to Copy Them.

The respondents argue that the only "relevant consideration" for the purpose of determining a claimed right to copy is "whether an item is in the control or custody of the clerk." (Warner Br. 31; see NBC Br. 21-23.) For this proposition the respondents rely on cases stating that control of exhibits in the Clerk's custody rests with the Court, and on court rules and cases which they contend establish a right to copy exhibits. None of the authorities relied on support the respondents' contention.

In both *United States v. Monjar*, 154 F.2d 954, 958 (3d Cir. 1946), and *Allen v. Lackey*, 197 Okla. 513, 188 P.2d 215, 217 (1947), the courts observed that exhibits admitted into evidence are subject to the control of the court. Unquestionably, court control of exhibits is not only appropriate, but a practical necessity. To say that a court has control of exhibits, however, does not begin to answer the question of how that control should be exercised, which is the issue in this case. Respondents offer not one single instance in which a court's control of exhibits has been exercised to permit copying of recorded evidence for public broadcast and distribution.

Respondent NBC cites local rules of thirteen district courts for the proposition that the courts allow "any applicants the right to inspect and copy all court records, including exhibits while in the custody of the Clerk." (NBC Br. 20 n.*.) Of these thirteen, however, three (E.D. Ill. Rule 18; N.D. Ind. Rule 19; S.D. Ind. Rule 16) actually *prohibit* furnishing copies of exhibits

admitted in evidence and impounded by the clerk except to "a party to the action." Four of the cited rules (C.D. Cal. Rule 29(c); S.D. Cal. Rule 29(b); E.D. Mich. Rule 26(7); N.D. Ohio Rule 10) provide only that "the court may permit photographs of exhibits to be taken by, or under the direction of, counsel," and one (W.D. Okla. Rule 15(d)) provides that exhibits may be photographed "under the supervision of the court" for "use on appeal or otherwise." Three of the remaining four rules cited (E.D. Cal. Rule 4(b); N.D. Cal. Rule 5(c); W.D. Wis. Rule 22) make no reference whatsoever to exhibits, and the language of the final rule (D.Me. Rule 13) applies only to a "paper or record on file with the clerk, including exhibits," and hardly reflects a considered judgment that even documentary evidence subpoenaed from third parties and in the custody of the clerk may be copied as a matter of right.

The doubtful status of the claimed public right to copy even documentary exhibits is further illustrated by the cases cited by the respondents. In *Sloan Filter Co. v. El Paso Reduction Co.*, 117 F. 504 (D. Colo. 1902), on which respondents primarily rely, the parties to a patent case, as part of an agreement of dismissal, sought to remove all testimony and documentary exhibits on file in the action. Another company, with an interest in the patent dispute, opposed the application and applied for "a copy of the testimony taken in the case." 117 F. at 505. The court did not discuss the disposition of the exhibits, which apparently consisted of nothing more than documents attached to depositions; its holding was merely that "the application of complainant to withdraw from the files *the testimony taken in the case* is denied." 117 F. at 507 (emphasis added). In the

other cited case involving exhibits,[2] *Allen v. Lackey*, 199 Okla. 513, 188 P.2d 215 (1947), the issue was the right of the opposing party to remove and perform certain tests upon an exhibit on file in the case; the court *denied* the application, holding that the exhibit should not be released if the purpose of the tests was not to adduce material evidence in the case. 188 P.2d at 218. The only case found by any party that squarely addresses the disposition of exhibits is *King v. King*, 25 Wyo. 275, 168 P. 730 (1917), discussed at pp. 25-26 of our original brief. There the court held that certain letters that had been used as exhibits at trial, "being property after they had served their purpose as evidence," stood in the same position as other personal property and thus could not be copied by the applicant.

The respondents not only fail to cite any rule or authority establishing a right to copy exhibits such as these, but also cite not one single instance when a court has permitted copying of a voice recording in its custody.[3] The treatment traditionally given to materials

[2]Respondents NBC et al. also cite *In re Mosher*, 248 F.2d 956 (C.C.P.A. 1957), and *New York Post Corp. v. Liebowitz*, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957), for the proposition that the courts have not "limited the right to inspect and copy court exhibits to interested non-parties." (NBC Br. 24 n.*.) Neither case, however, involved or discussed true exhibits; the first involved a copy of the decision of the Patent Office Board of Appeals, and the second a copy of the transcript of the trial judge's charge to the jury.

[3]Respondent Warner states (Warner Br. 38) that the right to copy tapes was "posed directly" in *Ortiz v. Jaramillo*, 82 N.M. 445, 483 P.2d 500 (1971). In that case, like *Menge v. City of Manchester*, 113 N.H. 533, 311 A.2d 116 (1973), cited by respondents NBC et al., the data to which the applicants desired access was stored on computer tape. In both cases, the courts

[footnote continued]

used as trial exhibits, therefore, demonstrates that the use of those materials as evidence does not render them available to the press and the public for copying. At the very least, the traditional treatment of these materials dispels any notion that there exists a "fundamental" or "long standing" right of the public to copy and distribute them, as stated by the court of appeals. (Pet. App. 17a.) Indeed, the treatment given to other types of voice recordings in the custody of district courts suggests just the opposite.

For example, the broadcast of court reporters' tape recordings of trials would seem to serve the interests of maximum trial publicity far more than broadcast of the tapes at issue here. Yet the universal practice is not to permit these recordings to be copied for publication. The respondents offer varying rationales for this prohibition. Respondent NBC points to the "limited purpose" of such recordings – to "augment . . . the accuracy of reporters' stenographic transcriptions." (NBC Br. 29.) The production and use of these presidential recordings at trial also had a "limited purpose" which did not encompass their broadcast and distribution; that purpose was to satisfy "the constitutional need for relevant evidence in criminal trials." *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974). Respondent Warner, on the other hand, contends that the bar against copying a court reporter's recording is

held that convenience dictated allowing the applicants to copy the computer tapes rather than being forced to review the back-up documentary material. The difference between computer tapes containing voting registration and tax assessment information, and voice recordings of individuals which are susceptible to broadcast and manufacture into phonograph records without the participants' consent, would seem too plain to warrant discussion.

"by no means universal" and that the matter is "apparently" left by most district courts "to the discretion of the trial judge." (Warner Br. 38.) Warner cites, however, not one instance in which such copying has been permitted, and in effect concedes that the only courts which have dealt with the matter by rule have *prohibited* copying, at least for purposes of "radio or television broadcast." Second, Warner makes the cryptic observation that a court reporter's recording is distinguishable from recorded conversations played in evidence because it does not "play any significant role in the proceeding itself." (*Id.*) But Warner's basis for demanding the tapes here, in addition to the transcripts it already has, is that the tapes are a "true and verbatim record" containing "accurate and objective information about one of the most important public events in American history." (Warner Br. 42.) That is far more true of a court reporter's tape – an aural recording of the entire trial – than it is of the exhibits which constituted only a part of the evidence at that trial. Simply put, the respondents offer not a single credible basis for holding that subpoenaed voice recordings are subject to a "precious common law right" of the public to obtain copies, whereas a court reporter's tape of the trial itself – or, for that matter, a recording of oral argument in this Court (see App. 104-105) – is not.[4]

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[4]The respondents contend that the almost universal prohibition against televising or broadcasting trial proceedings is distinguishable from the matter of broadcasting voice recordings played in evidence at a trial because that prohibition is designed to prevent disruption of trial and distraction of the participants. That argument, however, fails to account for the prohibition on post-trial broadcasting of a tape recording routinely made by the court reporter. The rationale that *does* support that prohibition is equally applicable to the tape recordings involved in this case:

[footnote continued]

3. The Interests Said to Be Served By Broadcast and Sale of the Tapes Do Not Justify Dissemination By the Court of Recordings in Its Custody.

The personal interest that Mr. Nixon seeks to protect here is, put very simply, the mental anguish of having his intimate conversations – containing, in the words of Justice Harlan, the "frivolous, impetuous, sacrilegious, and defiant discourse . . . that liberates daily life"[5] – packaged, broadcast and sold for popular entertainment around the world.[6] While the respondents, like the court of appeals, prefer to characterize Mr. Nixon's concern as a desire to prevent exposure of "misconduct or questionable conduct" (Pet. App. 22a; see Warner

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namely, preventing the exploitation and embarrassment of parties and witnesses by mass distribution of their live, though involuntary, performances at trial. As stated by the American Bar Association's Committee on Professional Ethics and Grievances in its opinion disapproving radio broadcasting of trials, "Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience." (Statement quoted in *Estes v. Texas*, 381 U.S. 532, 597 (1965) (Appendix to concurring opinion of Justice Harlan).)

It should also be noted that where experimentation with televising trials is permitted, it is to be done only with the consent of the parties *and* the witnesses. Code of Judicial Conduct, Canon 3(A)(7)(c).

[5]*United States v. White*, 401 U.S. 745, 787 (1971) (dissenting opinion).

[6]A similar interest of a defendant in being free of televised broadcast of his trial was recognized in *Estes v. Texas*, 381 U.S. 532, 549 (1965): "The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him . . ."

Br. 85, NBC Br. 45), they do not seriously question the actuality or legitimacy of his true interest. Rather, they contend that neither the personal interest of Mr. Nixon nor the interest in preserving respect for the dignity of the presidential office[7] is "so significant as to justify a denial" of their applications. (Warner Br. 80.)

In meeting this argument on its terms, we do not mean to suggest that the question whether a court should make voice recordings available for broadcast and sale is one to be resolved by balancing the claimed benefits of such dissemination against the personal concerns of those whose conversations are recorded in each particular case.

To leave the issue for decision on this basis not only would be unfair to the individuals whose interests are at stake, but also would divert trial courts from their primary function. The availability of voice recordings in the custody of the clerk for copying by members of the press would likely become, should the decision of the court below be upheld, an often-litigated issue[8] that would add still further burdens to the responsibilities of district judges whose time is better spent on the business of administering justice. The sort of considerations that the respondents and the court of appeals deem appropriate in the balancing process[9] not only

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[7] See our original brief at pp. 47-50.

[8] As we have discussed, in addition to tapes subpoenaed from third parties, future claims of a "precious common-law right" to copy such recordings will involve court reporters' tapes of trials; recordings of wiretapped conversations and other electronic surveillance; tapes of oral arguments on appeal; and recorded depositions in civil cases (see *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975)).

[9] At various times the respondents urge the Court to consider, for example, the "political and historical significance" of the trial

[footnote continued]

leave a court almost totally without a guide for the exercise of discretion, but ensure that it will be the notoriety of the defendant, the sensational aspects of the trial, and the clamor surrounding the demand for copies that will decide the issue.

In weighing the interests in publicity said to support the decision of the court of appeals, it is important to keep in mind that it is a court which is asked to be the vehicle for public distribution of these tapes, and that the function of a court is only incidentally to provide public information. To be sure, as stated by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-492 (1975), the press in reporting court proceedings plays an important role in guaranteeing the fairness of trials and furthering "the beneficial effects of public scrutiny upon the administration of justice," and the power to conduct judicial proceedings in *secret* is one to be sparingly exercised. But "the chief function of our judicial machinery is to ascertain the truth," and like televising of trials, the broadcast and distribution of evidentiary recordings "cannot be said to contribute materially to this objective." *Estes v. Texas, supra*, 381 U.S. at 544. Chief Justice Warren, in his concurring opinion in *Estes*, summed up the matter as follows (381 U.S. at 575):

> "It is argued that television not only entertains but also educates the public. But the function of a

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(NBC Br. 16), the status of the subject as a "public official" rather than an ordinary citizen (Warner Br. 85), the relative similarity of the conversations to "conversations between business associates" rather than "bedroom or other intimate conversations" (NBC Br. 53, quoting the opinion of the court of appeals), and the degree to which the content of the recording has previously been disseminated (*id.* at 54; Warner Br. 86).

> trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process."

The respondents concede that the content of the tapes has already received intensive world-wide publicity, and it was the consensus of the district judges in the court below that the distribution of transcripts would "constitute more than adequate disclosure to the public of what the tapes contained." (Memorandum of Chief Judge Hart, App. 11.) It is said that "voice, inflection and timing" are not adequately conveyed by a transcript (Warner Br. 83), and that "[p]ublic understanding of Watergate requires public familiarity with these tapes" (*id.* at 44).[10] We submit that the effect of broadcasting and marketing these tapes will be to titillate rather than to inform the public, that their use for entertainment will demean rather than promote their character as a historical record of one of the most grave and important trials in American history, and that their dissemination by the court for commercial use will mock the serious judicial purposes for which this Court in *United States v. Nixon, supra,* held they must be produced. Wholly putting aside the effect on Mr. Nixon and the others whose uninhibited conversations appear on the tapes, we submit that a proper balance of the

[10]It is also contended that merchandizing of the tapes will promote scholarly research. But as we have repeatedly stated, this case does not involve any question of access to the recordings for scholarly purposes or even simply to satisfy curiosity, and the currently proposed regulations under the Presidential Recordings and Materials Preservation Act are designed in any event to make these and other presidential recordings available for such purposes.

public interests at stake dictates that the court not become an agent for the commercialization of these presidential recordings.

4. The Respondents' First Amendment Claim Has Been Squarely Rejected By Recent Cases.

In essence, the First Amendment claim of the respondents, based primarily on *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975), is that the courts may not prevent the broadcast of "information" that is made available to the public generally; the tapes have been publicly played; and therefore the courts may not prevent their broadcast. This syllogism ignores the difference between playing the tapes at trial and providing copies to the public, and it erroneously equates a direct restraint on publication such as that involved in *Cox Broadcasting Corp.* with a refusal to supply the item requested.

The respondents' arguments are nearly identical to those advanced in *Garrett v. Estelle,* 556 F.2d 1274 (5th Cir. 1977), where a newsman claimed a First Amendment right to film an execution by the State of Texas which he and other selected members of the public were permitted to view on closed-circuit television at the prison. The court rejected the newsman's claims on the authority, *inter alia,* of *Pell v. Procunier,* 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974), and its reasoning is squarely applicable here. The court stated (556 F.2d at 1279):

> "Finally, amicus suggests that the proposed simultaneous closed circuit telecast is a 'publication' and that to prohibit its use in any way, such as by filming, is an illegal prior restraint on

republication. This suggestion is similar to the argument made by Garrett that once he is given access to information by the government, here by closed circuit telecast, the government may not limit the use Garrett may make of the information, such as filming it. But the access granted to Garrett and the other members of the press is limited. Access for the purpose of filming is not provided, and the first amendment does not require that it be provided."

The holding in *Garrett* was underscored in the still more recent case of *United States v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), where newspaper reporters sought access to various exhibits and other matters relating to the trial of former Senator Edward Gurney. The trial court, while permitting the press to inspect exhibits actually introduced in evidence,[11] refused to permit access to exhibits identified but not received in evidence or to the actual transcript of Senator Gurney's grand jury testimony, which was read in part to the jury. The court of appeals rejected the newspapers' claim that such restrictions constituted a prior restraint on the press. Instead, the court found that the press was given every right afforded to the public generally, and it stated that "we do not think that the press has any First Amendment right of access to those matters not available to the public." 558 F.2d at 1209. The court concluded that the trial judge is granted "broad discretion in ordering the daily activities of his court," *id.*, and held that his discretion had not been abused in that case. In an observation particularly pertinent here,

[11]The trial court's order did *not* permit photocopying of the exhibits, and counsel has been advised by the Clerk that copies were not in fact furnished.

the court stated that whereas the press had been furnished a transcript of the portions of Senator Gurney's grand jury testimony actually read to the jury, "[i]t was proper to refuse to require the Clerk to blank out the unread portions of the grand jury testimony and deliver the transcripts so excised to the news media." *Id.* at 1210.

The constitutional arguments of the respondents are, we submit, untenable.[12]

5. The Presidential Recordings and Materials Preservation Act and This Court's Decision In *Nixon v. Administrator of General Services* Have No Bearing on This Case.

The respondents rely on this Court's recent opinion in *Nixon v. Administrator of General Services,* ____ U.S. ____, 97 S.Ct. 2777 (1977), for the proposition that Mr. Nixon retains no legally cognizable privacy interest in tape recordings that have already been made public. The exclusive concern of the Court in that case, however, was whether the Constitution barred a governmental search of the recordings and other presidential materials. It was the "constitutionally protected privacy rights"[13] that this Court was referring to in stating that the privacy claim could not

[12]The respondents' arguments based on the Sixth Amendment are fully answered in our original brief (pp. 44-47).

[13]Whatever the scope of a constitutional right to privacy, it plainly does not encompass all the interests in privacy that have received or should receive legal protection. See concurring opinion of Mr. Justice Stewart in *Whalen v. Roe,* ____ U.S. ____, 97 S.Ct. 869, 881 (1977).

be asserted "as to the documents and tape recordings that [Mr. Nixon] has already disclosed to the public," 97 S.Ct. at 2798. Moreover, the claim under consideration by the Court in *Nixon v. Administrator* related solely to preventing disclosure of the contents of the materials, a claim which logically would have no force once the contents had actually been disclosed. The Court did not address the question of disseminating copies of the tapes to the public, and its opinion cannot be read to mean – as respondents suggest – that Mr. Nixon has no interest that a court may recognize in determining whether to supply aural copies of his recorded conversations to the press and public for whatever use they may deem fit.

Respondent Warner also takes the position that, by reason of the Act and this Court's decision upholding its facial validity, Mr. Nixon "no longer has a cognizable property interest to be asserted against the general public." (Warner Br. 89.) The Act, of course, did not deal with the question of title to the presidential tapes. But in any event, no issue in this case depends on who has title to the recordings. Mr. Nixon's interest in these tapes rests on the fact that they capture his own voice in private conversations, and his standing to contest the disposition which the district court is asked to make of them is firmly established by the fact that they were seized from his personal control by virtue of a judicial subpoena.[14] See, *e.g.*, *Mancusi v.*

[14]Thus it is also irrelevant that the tapes which the respondents seek to copy are themselves copies of the originals (see Warner Br. 29 n.14). To contend that a court's power to disseminate voice recordings against the will of the party from whom they were obtained is enhanced by the act of copying those recordings prior to dissemination would be absurd. The

[footnote continued]

DeForte, 392 U.S. 364, 368-370 (1968). The respondents' argument, if adopted, would mean that an individual whose conversations are captured by electronic surveillance would have no standing to protest their release for broadcast purposes simply because he does not own the tape on which the conversations are recorded. No authority cited by the respondents requires or permits such a result.

Respondent Warner further argues that dissemination of these tapes will further the objectives of the Presidential Recordings and Materials Preservation Act. It happens, however, that the question of permitting copying (and thus broadcast and sale) of the presidential tapes has been the subject of a running and unresolved dispute between GSA and the Congress, which under the Act has the power to veto GSA's proposed access regulations. Though the regulations are not directly involved here, it is instructive to review the remarkable history and present status of this dispute.

GSA's originally proposed regulations provided, in §105-63.404(c), that "No researcher may reproduce or have reproduced sound recordings of the reference copies of the tape recordings . . ." GSA explained that the purpose of this provision was "to prevent unwarranted commercial exploitation of the tape

fact that the tapes are copies made by the court may, however, be relevant to the question whether they may be *retained* by the court rather than returned to the owner of the originals. Mr. Nixon has never claimed a right to return of the court copies of the tapes, nor objected to their retention by the Clerk. Respondent Warner's contention that the petitioner's claim means that "the courts would be barred even from retaining a copy of documentary exhibits in their permanent files" (Warner Br. 32 n.17), pursuant to the *Manual for Clerks of the United States District Courts* or otherwise, is untenable.

recordings." GSA, Report to Congress on Title I, Presidential Recordings and Materials Preservation Act, at G-67 (March 1975). The Senate, however, disapproved the proposed regulations in their entirety. S. Res. 244, 94th Cong., 1st Sess.; 121 Cong. Rec. S 15808 (daily ed. Sept. 11, 1975).

The second set of proposed regulations provided in §105-63.404(b) that reproduction of the tapes would be prohibited "unless such reproduction is authorized by subsequent Federal court decisions concerning these or related tape recordings," but the Administrator of GSA might determine to revoke or modify the restriction after review and report by the Presidential Materials Review Board. These proposed regulations were withdrawn by GSA at the request of the Justice Department,[15] and in April 1976 GSA submitted a third revised proposal. This third set of regulations eliminated the proviso relating to subsequent judicial decisions and gave the Review Board, rather than the Administrator, the power to determine whether the copying restriction should continue beyond two years. The copying provisions, along with six others, were this time disapproved by the House of Representatives.[16]

The fourth and latest set of public access regulations was delivered to Congress on June 2, 1977. Section 105.63.404(c) of these regulations provides, as to

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[15] For good measure the Senate – taking the position that such withdrawal was unauthorized by law – adopted a resolution disapproving seven of the regulations, not including §105-63.404(c). S. Res. 428, 94th Cong., 2d Sess.; 122 Cong. Rec. S 5291 (daily ed. April 8, 1976).

[16] H. Res. 1505, 94th Cong., 2d Sess.; 122 Cong. Rec. H 10043 (daily ed. Sept. 14, 1976).

copying: "Researchers may obtain copies of the reference tapes only in accordance with procedures comparable to those approved by the United States District Court for the District of Columbia in *United States v. Mitchell, et al.; In re National Broadcasting Company, Inc., et al.*, D.C. Miscellaneous 74-128." The district court, of course, has yet to approve any such procedures, and Congress has yet to act on the latest proposed regulations. At least for the moment, therefore, it appears that by a rather uneasy compromise between GSA and Congress, broadcast and marketing of the hundreds of tapes *not* involved here may depend on the ultimate outcome of this case.

CONCLUSION

For the reasons stated herein and in our original brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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